

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 329

**M. P. MULLANEY, COMMISSIONER OF TAXATION
OF THE TERRITORY OF ALASKA, PETITIONER,**

vs.

**OSCAR ANDERSON AND ALASKA FISHERMEN'S
UNION**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 17, 1951.

CERTIORARI GRANTED NOVEMBER 5, 1951.

No. 12586

**United States
Court of Appeals**
for the Ninth Circuit.

**OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,**

Appellants,

vs,

**M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,**

Appellee.

Transcript of Record

**Appeal from the District Court
for the Territory of Alaska
Division Number One.**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Answer	7
Amendments by Interlineation.....	7
Answers to Interrogatories Propounded by Plaintiff on February 4, 1950.....	31
Answer to Interrogatory No. (3) of Set of In- terrogatories No. 3 Propounded by Plaintiff on February 28, 1950.....	29
Appellant's Statement of Points.....	154
Attorneys of Record.....	1
Clerk's Certificate	152
Complaint	2
Cost Bond on Appeal.....	25
Designations of Portions of the Record.....	27
Designation of Record to Be Printed.....	156
Findings of Fact and Conclusions of Law....	18
Interrogatories of Plaintiff No. 1.....	33
Interrogatories of Plaintiff No. 2.....	35
Interrogatories of Plaintiff No. 3.....	39
Judgment and Decree.....	23

INDEX

PAGE

Minute Orders:

January 14, 1950.....	28
January 19, 1950.....	29
Notice of General Appeal.....	25
Opinion	14
Plaintiff's Waiver	42
Reporter's Transcript of Record:.....	46
Statement of Points.....	44
Stipulation to Correct Transcript of Testimony	45
Stipulated Notes of January 19, 1950, Perpetu- ated Testimony.....	10
Supplemental Designation of the Record.....	43

Witness, Defendant's:

Parke, Thomas

—direct	95
—cross	120

Witness, Plaintiffs':

Anderson, Oscar

—direct	48
—cross	85
—redirect	92
—recross	94

INDEX

Proceedings in the U.S.C. A. for the Ninth Circuit	Pa
Order of submission	10
Order directing filing of opinion and dissenting opinion and filing and recording of judgment	10
Opinion, Pope, J.	10
Dissenting opinion, Denman, J.	18
Judgment	19
Clerk's certificate	19
Order allowing certiorari	19

ATTORNEYS OF RECORD

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Juneau, Alaska,

Attorney for Appellants

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Territorial Attorney General,

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Assistant Territorial Attorney General,

Juneau, Alaska,

Attorneys for Appellees.

Oscar Anderson, etc.

In the District Court for the Territory of Alaska
1st Division

No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION and Labor Union Acting on
Behalf of Certain of Its Members,

Plaintiff,

vs.

TERRITORY OF ALASKA,

Defendant.

COMPLAINT

Plaintiffs complain and for their cause of action,
allege:

I.

That at all times herein mentioned the defendant, Territory of Alaska, is a part of the United States of America, and has been granted certain powers and rights under an act or acts of Congress of the United States of America.

II.

That at all times herein mentioned the plaintiff, Alaska Fishermen's Union, is a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations, and is maintaining this proceeding for the benefit of its members who are classified as fishermen and who are classed as non-residents, and who live principally within the states of Oregon, Washington and California, and who are employed by fish-packing companies who oper-

ate fish-packing canneries within the Territory of Alaska in the various fishing areas, and who employ fishermen in fishing with gill nets, trap fishermen, crews of tenders, and other floating equipment used in handling of fish in the Territory of Alaska. That plaintiff union at all times herein mentioned has been and still is and for an indefinite future time will be the duly authorized and established bargaining agent for all of said nonresident fishermen, with respect to the terms and conditions of their employment, and particularly with respect [115*] to all of the matters and things that are the subject matter of this complaint. Plaintiff, Oscar Anderson, is the Secretary-Treasurer for said plaintiff union, with the authority, and has the full authority of said union to handle all business of the union and its members with respect to all the matters and things that are the subject matter of this complaint. That said union represents approximately four thousand nonresident fishermen who fish in Alaska each fishing season, and two thousand resident fishermen who fish in the Territory of Alaska during each fishing season.

III.

During the past several years all fishermen fishing in Alaska during each fishing season have been assessed a license tax by the Territory of Alaska, as follows:

Resident fishermen paying a \$1.00 license tax,
and nonresident fishermen paying \$25.00
license tax.

That defendant, Territory of Alaska, during the 1948 Legislative Session sponsored legislation to increase the license fees of nonresident fishermen from \$25.00 per year to \$50.00 per year for each fisherman who was not a resident of the Territory of Alaska, and also provided that resident fishermen who were residents of Alaska would pay the license fee of \$5.00 per year. That this act increasing the license fee of nonresident fishermen from \$25.00 per year to \$50.00 per year was enacted by the Legislature of the Territory of Alaska, and approved by the Governor of said territory on the 21st day of March, 1949. True and correct copies of said purported statute enacted by the legislature are attached hereto, marked Exhibit A, and incorporated herein by this reference.

IV.

As applied to said plaintiff and members of said plaintiff union, who fish in Alaska during each fishing season, said [116] purported statute violates the Fourteenth Amendment of the Constitution of the United States, because it discriminates against non-residents of the Territory of Alaska who have equal rights with residents in fishing within the Territory of Alaska. That said purported statute also is in violation of Section Nine of the Organic Act, providing that all taxes shall be uniform upon the same class of subjects. Said purported statute also violates Article 3, Section 2, of the Constitution of the United States, because it is an unwarranted invasion of the Admiralty and Maritime

Jurisdiction of the United States as applied to said plaintiff union and its members, does and will prejudice and adversely affect the uniformity and consistency of the general maritime law as it is applied to fishermen. As so applied, said statute violates Article I, Section 8, of the Constitution of the United States, in that it places an undue burden on interstate and foreign commerce. That plaintiff union and its members have no adequate remedy at law, and will be irreparably injured unless defendant is enjoined and restrained of demanding and collecting said license tax of \$50.00 from each nonresident fisherman; and unless defendant is so enjoined and restrained, there will be a multiplicity of suits to recover the amounts paid over and above \$25.00 license tax, which has been the license tax for many years past, and which is the license tax which is applicable to the resident fishermen. The amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

Wherefore, plaintiffs pray that this court issue an order restraining defendant until further order of this court from demanding and collecting from any nonresident fisherman the sum of \$50.00, license tax, in purported reliance upon said act of the legislature of the Territory of Alaska, [117] pertaining to license taxes for fishermen; and plaintiffs further pray for judgment and decree of this court declaring said act of the Legislature unconstitutional and invalid insofar as said act purports to authorize and require the payment of \$50.00

license fee by nonresident members who go to the territory each fishing season to fish for fish packing companies, and restraining the defendant herein from making said collection of said \$50.00 license fee from any nonresident fisherman in purported reliance upon said statute of the Territory of Alaska. Plaintiff further prays for such other and further relief as to the court may appear just in this cause.

R. E. JACKSON,

WILLIAM L. PAUL, JR.,

Attorney for Plaintiffs.

State of Washington,

County of King—ss.

Oscar Anderson, being first duly sworn on oath, deposes and says:

That he is Secretary-Treasurer for the plaintiff in the above-entitled action and makes this verification for and on its behalf; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

OSCAR ANDERSON.

Subscribed and sworn to before me this 23rd day of May, 1949.

[Seal]

R. E. JACKSON,

Notary Public in and for the State of Washington.

[Endorsed]: Filed May 26, 1949. [118]

[Title of District Court and Cause.]

AMENDMENTS BY INTERLINEATION

Pursuant to leave of court, plaintiff hereby amends the complaint as follows:

I.

M. P. Mullaney is Commissioner of Taxation of the Territory of Alaska.

WILLIAM L. PAUL, JR.,

Plaintiff's Attorney

Receipt of copy acknowledged.

[Endorsed]: Filed March 21, 1950. [119]

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant, the Territory of Alaska, by its attorneys, after leave of court first had and obtained, files this its Amended Answer to the Complaint on file herein, answering as follows, to wit:

First Defense

(1) Defendant admits the allegations contained in Paragraph I of plaintiff's complaint.

(2) Referring to Paragraph II of plaintiff's complaint, defendant alleges that it does not have sufficient information to form an opinion as to the

truth or falsity of the allegations contained therein, and, therefore, denies the same upon that ground.

(3) Referring to Paragraph III of plaintiff's complaint, defendant denies the allegations contained in the first sentence thereof in respect to the allegation that all fishermen fishing in Alaska have been assessed a license tax by the Territory of Alaska; and defendant alleges that only certain fishermen fishing in Alaska have during the past several years been assessed a license tax by the Territory of Alaska. Defendant admits the allegations contained in the second, third and fourth sentences of Paragraph III of plaintiff's complaint.

(4) Defendant denies each and every material allegation contained in Paragraph IV of plaintiff's complaint.

Second Defense

For a second and separate defense to the Complaint defendant alleges that the \$50.00 license fee imposed upon nonresident fishermen under Chapter 66, Session Laws of Alaska, 1949, does not constitute an invalid discrimination against such nonresident fishermen because

(1) The Territorial Commissioner of Taxation and his deputies are placed to additional burden and expense in the matter of collecting license taxes levied under said Chapter 66 from nonresident fishermen as compared with the collection from resident fishermen.

(2) Under various laws enacted by both the Territory and its municipalities for the protection of the health and safety, and for the promotion of the welfare of the general public in Alaska, such as Territorial laws relating to the welfare and protection of wage earners of Alaska, the Territorial Workmen's Compensation Act, laws enacted for the purpose of protecting public health, and police protection offered by both the Territory and its municipalities, the nonresident fishermen in Alaska are not discriminated against but receive benefits under such laws on an equality with resident fishermen. However, considering the tax scheme of the Territory and the relatively short period of time that nonresident fishermen are in the Territory, the nonresident fishermen in Alaska do not contribute as large an amount to the expense of execution and administration of such laws as do the resident fishermen.

(3) Giving consideration to the benefits and protection received by nonresident fishermen from Territorial and municipal laws, and to the relatively brief periods of time [121] during which substantial earnings are made by average fishermen from fishing in Alaska, the \$50.00 fee imposed on nonresident fishermen is entirely reasonable and not excessive.

Wherefore, defendant having fully answered the

Complaint filed herein, prays that plaintiff take naught by reason thereof and that the same be dismissed with prejudice.

J. GERALD WILLIAMS,
Attorney General of Alaska.

JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendant.

Copy Received.

[Endorsed]: Filed Jan. 27, 1950. [122]

[Title of District Court and Cause.]

STIPULATED NOTES OF JANUARY 19, 1950,
PERPETUATED TESTIMONY

Testimony of Carl Wiedeman

Lives at Juneau—gave figures on trolling in Southeastern Alaska 1941 through 1949:

Date	Gross Earnings	Expenses	Net Earnings
1941—4 mos.	\$2,801.00	\$ 750.00	\$2,061.00
1942—5 mos.	3,862.00	1,266.00	2,614.00
1943—5 mos.	4,021.00	1,627.00	2,394.00
1945—4½ mos.	4,221.00	1,494.00	2,727.00
1946—5 mos.	4,971.00	2,596.05	2,373.78
1947—5 mos.	3,710.00	1,976.41	1,833.59
1948	4,978.63	2,171.00	2,807.63
1949	4,126.80	1,861.00	2,265.80

Trolling operations were usually 4½ to 5 months. Expenses of operation included gas and oil, repairs on boat and engine—in the past 5 years de-

ductions for food have been made—also included is gear replacements. No depreciation has been charged. The value of the boat owned by Wiedeman is \$6,000. He figures that he has worked 14 hours daily while trolling and made an average net earnings of \$2,384.48 yearly.

Testimony of Paul Ecklund

Lives at Thane—gave figures on trolling for the past three years in Southeastern Alaska, 1947 through 1949:

Date	Gross Earnings	Expenses	Net Earnings
1947—5 mos.	\$5,521.00		\$2,234.70
1948	7,533.41		4,075.72
1949	6,729.27		4,295.00

Expenses include \$420.00 yearly depreciation on hull and \$740.00 yearly depreciation on engine—the cost of boat was \$4,200.00. He believes that resident and nonresident trolling boats are about the same with perhaps the nonresident boats being a little larger. He fished off Yakobi Island inside the three-mile limit mostly, icing his fish and bringing them into Pelican at periodic intervals. [123]

Testimony of Christofer Nelson

A gillnetter from Bristol Bay, worked at APA Diamond J., testified as to his earnings in 1947-8-9. The Company, meaning employer, pays resident fisherman's fare from home to fishing grounds and return. Nineteen and a half actual fishing days included in about two months' work, amount to

one-third resident and two-thirds resident fishermen at Diamond J.

Date	Gross Earnings
1947.....	\$3,487.98
1948.....	2,511.00
1949.....	1,413.00

Testimony of Chris McNeil

A resident of Juneau—a Bristol Bay gillnet fisherman since 1946 for APA Diamond J. This witness believes he was over average in 1947. In 1948 and 1949 in halibut fishing, he fished in Area II all over Lynn Canal, and in 1949 all over Icy Strait as well. In 1949 at seining he fished all over Icy Strait.

Date	Gross Earnings
1947.....	\$3,100.00
1948.....	2,517.32 \$1,208.89 Halibut Area II
1949.....	1,318.74 Bristol Bay, \$2,623.48 Icy Strait Seining, \$1,021.47 Halibut Area

Testimony of George Lane

A resident of Juneau, has been a gillnet fisherman for the last 17 years—mostly at APA Koggiung Diamond J. This witness testified that for the past three years the average catch in Bristol Bay of residents and nonresidents was about the same, although the tendency is for nonresidents to be a little higher because only highliners are hired. This witness testified that he fished all over Bristol Bay, although he did not get down as far as the blinker about 80 miles below the Naknek

River. He did get as far as Point Etolin about 70 miles below on the North Side of Bristol Bay.

Date	Gross Earnings
1946.....	\$3,104.13
1947.....	5,246.16
1948.....	3,104.13
1949.....	2,419.20 Bristol Bay; \$2,900.00 seining

Testimony of Bill Bigelow

A resident of Wrangell, has been a seiner since 1936; gave testimony of earnings at seining from 1943 through 1949. This witness testified that from 1943 through 1947 the salmon seining season was from about July 5 to September 3, with extra time spent before and after the season getting the boat ready. For the past two years he has fished at APA Koggrung, in addition to salmon seining, and believes that he was about average at salmon seining.

Date	Share	No. of Shares Earned	Gross Earnings
1943	\$ 737.00	5 shares	\$ 3,685.00
1944	2,464.24	5 shares	12,321.20
1945	737.00	3 1/4 shares	2,412.28
1946	(not seining)		
1947	737.00	3 1/2 shares	2,579.50
1948	743.00	3 1/2 shares	
	2,639.26 Bristol Bay		5,054.01
1949	2,944.00	2 3/4 shares	
	1,434.00 Bristol Bay		9,530.00

TESTIMONY OF FRED SOBERG

A resident of Juneau—a troller for past three years—prior to that he had worked in Bristol Bay as a gillnetter for CPRA, Scandinavian Cannery, and for Wingard at Ugashik. He stated that in Bristol Bay the averages for the residents were

lower. The nonresident average at a particular cannery was consistently larger, although as between canneries the lead of the nonresidents varied, depending upon the attitude of the superintendent to favor residents or nonresidents and select better fishermen thereby. He believes that from his experience in trolling the nonresident boats are larger and better equipped. At trolling in Southeastern Alaska he reported to some station about once weekly, these stations being Pelican and Elfin Cove. He owns his own boat which is 29 feet long and is powered by a 42 h.p. motor and usually trolls about 4 months a year. [125]

In the District Court for the Territory of Alaska
Division Number One at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Plaintiff,

vs.

M. P. MULLANEY,

Defendant.

OPINION

Appearances:

WM. L. PAUL, JR.,

R. E. JACKSON,

Attorneys for Plaintiffs.

J. GERALD WILLIAMS,

Attorney General of Alaska,

JOHN H. DIMOND,

Assistant Attorney General,

For Defendant.

By Chapter 66, SLA, 1949, the Territorial Legislature increased the license taxes on resident fishermen from \$1 to \$5 and on nonresident fishermen from \$25 to \$50. The \$25 tax, imposed in 1933 when the purchasing power of a dollar was more than double what it now is, was sustained in *Anderson v. Smith*, 71 F(2), 493.

Plaintiffs seek to restrain the enforcement of this Act, so far as it applies to nonresident fishermen, on the grounds that:

(1) It contravenes the 14th Amendment in that it discriminates against nonresidents;

(2) That it conflicts with the provision of Section 9 of the Organic Act, 37 Stat. 512, 48 USCA, 78, requiring uniformity of taxation on the same class of subjects.

(3) That it encroaches on the admiralty jurisdiction, thereby substantially affecting its uniformity, and.

(4) Burdens interstate commerce in violation of Article 1, Section 8, of the Constitution.

Since the third contention is disposed of adversely to [126] plaintiff by *Alaska Steamship Company v. Mullaney*, decided March 1, 1950, by the Court of Appeals for the 9th circuit, and *Just v. Chambers*, 312 U. S. 383, 392; and it is well set-

tled that a tax of this kind is not a burden on interstate commerce because the taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce, *Toomer v. Witsell*, 334, U. S. 385, 394, and that the uniformity provision of the Organic Act does not apply to license taxes, *Alaska Fish Saltery & By-Products Co.*, 255 U. S. 44, these contentions will not be discussed.

So far as the remaining contention that the tax violates the 14th Amendment is concerned, the question differs in form only from that presented in *Martinsen v. Mullaney*, 85 F. S. 76. In that case this court held that in the absence of evidence of the existence of a rational basis for classification, the tax of \$50 on nonresident fishermen was invalid under the Civil Rights Act. In the instant case the defendant has introduced evidence showing the earnings of nonresident fishermen and the difficulty and expense of collecting the tax from them, detecting evasions and apprehending violators. Briefly, the evidence shows that thousands of non-residents come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from 20 days in Bristol Bay to 2 months elsewhere, during which time they enjoy the protection of the local government; that among them are hundreds of trollers who come to the Territory in their power boats, roaming far and wide along the 26,000 miles of coastline; and that since they own no property and are not required by the shipping laws to enter or clear upon arrival in or departure from the Territory and, moreover, warn

each other by radiophone of the proximity or presence of the tax collector, the difficulties of detection, apprehension [127] and collection during the short fishing season are well nigh insuperable. Moreover, the evidence shows that evasion does not end with apprehension, for often there is a claim of local residence, the verification of which can not be undertaken until the pursuit of evaders ends with the close of the fishing season, when, upon discovery of the falsity of the claim, the violator is invariably out of the jurisdiction of the Territory. It is not surprising, therefore, that the testimony shows that 90% of the cost of collecting the taxes under Chapter 66 is incurred in collecting or attempting to collect the nonresident tax.

The evidence further shows that the net annual earnings of trollers for a season of 4 to 5 months average approximately \$3500; of gill netters in Bristol Bay approximately \$2500 for a season of 20 days, while the average earnings of those employed on cannery tenders and traps are approximately \$1500 and \$2000, respectively.

I am of the opinion, therefore, that the classification of fishermen into residents and nonresidents rests on substantial differences bearing a fair and reasonable relation to the object of the legislation, within the doctrine of *Royster Guano Co. v. Virginia*, 253, U. S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37. Indeed, administrative inconvenience and expense in the collection of a tax may themselves afford sufficient basis for such a classification. *Carmichael v. South-*

ern Coal Co., 301 U. S. 495, 512; Madden v. Kentucky, 309 U. S. 83, 89, 90: Likewise the encouragement of settlement and preferment of local enterprise would appear to be sufficient under Haavik v. Alaska Packers' Assn., 263 U. S. 510, 515; Welch v. Henry, 305 U. S. 134, 146; New York Rapid Transit v. New York, 303 U. S. 573, 580. And the court will take judicial notice of [128] the national policy implicit in many recent legislative and administrative measures designed to accomplish these ends.

Accordingly, I conclude that the tax is valid and that the complaint should be dismissed.

GEORGE W. FOLTA,

District Judge.

[Endorsed]: Filed March 21, 1950. [129]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on the 16th day of March, 1950, on the complaint and amended complaint of plaintiffs and the answer and amended answer of the defendant to the complaint. Plaintiffs were represented by their counsel, William L. Paul, Jr., of Juneau, Alaska, and R. E. Jackson of Seattle, Washington; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence having been

adduced before the court on behalf of plaintiffs and defendant and the cause having been submitted for judgment on March 16, 1950, and the court having taken the matter under advisement on that date, and having thereafter on the 21st day of March, 1950, rendered its written opinion, which was on that date filed with the Clerk of the Court, now, upon the evidence adduced, the court does make the following:

Findings of Fact

1. Plaintiff, Alaska Fishermen's Union, is a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations. Plaintiff, Oscar Anderson, is the Secretary-Treasurer for said plaintiff union, with authority to handle all business of the union and its [130] members.

2. Defendant is an officer of the Territory of Alaska, and has been and now is the Commissioner of Taxation for the Territory of Alaska, authorized by law to collect taxes for the Territory of Alaska and to enforce the tax laws of the Territory.

3. This action arises under the Act of March 21, 1949, designated as Chapter 66, Session Laws of Alaska, 1949.

4. Plaintiff labor union maintained this action for the benefit of its members who are classified as fishermen and who are classed as nonresidents, and who live principally within the States of Oregon, Washington and California, and who are employed

by fish packing companies who operate fish packing canneries within the Territory of Alaska in the various fishing areas, and who employ fishermen in fishing with gill nets, trap fishermen, crews of tenders and other floating equipment used in the handling of fish in the Territory of Alaska. Plaintiff union has been and now is the duly authorized and established bargaining agent for all of said nonresident fishermen, with respect to the terms and conditions of their employment.

5. Said union represents approximately three thousand two hundred (3,200) nonresident fishermen who fish in Alaska each fishing season, and two thousand (2,000) resident fishermen who fish in Alaska each fishing season.

6. Thousands of nonresident fishermen come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from twenty days in Bristol Bay to two months elsewhere. Said nonresident fishermen come to the Territory shortly before the fishing season and depart therefrom immediately after the close of [131] the fishing season. Said nonresidents own no property in the Territory; and are not required by shipping laws to enter or clear upon arrival in or departure from the Territory. During the time said nonresidents are within the Territory, they enjoy the protection of local government.

7. Defendant and his deputies have detected evidence indicating large scale evasions of payment of the fishermen's license tax by nonresident fish-

ermen. In order to enforce collection of this tax from the nonresident fishermen, defendant found it necessary to send an enforcement officer each year throughout the various fishing areas located along the 26,000 miles of Alaska coastline. The difficulties encountered by defendant and his deputies in the collection of license taxes from nonresident fishermen and the detection and apprehension of those who evade payment of this tax are almost insuperable.

8. Little difficulty is encountered by defendant and his deputies in the collection of the license tax from resident fishermen. There are few attempts at evasion by this class of fishermen, and since resident fishermen are within the jurisdiction of the Territory after the close of the fishing season, the detection and apprehension of those who do evade payment of the tax is not difficult.

9. It is much more difficult and expensive to collect the license tax from nonresident fishermen than it is from resident fishermen. Approximately 90% of the cost of collecting the fishermen's license taxes is incurred in collecting or attempting to collect said taxes from nonresident fishermen.

10. The net annual earnings of trollers for a season of four or five months average approximately \$3,500.00; [132] of gill netters in Bristol Bay approximately \$2,500.00 for a season of twenty days; and the average earnings of those employed on cannery tenders and traps are approximately \$1,500.00 and \$2,000.00, respectively.

Based upon the foregoing findings of fact, the court makes the following:

Conclusions of Law

I.

Chapter 66, Session Laws of Alaska, 1949, does not contravene the Fourteenth Amendment to the Constitution, the Civil Rights Act, or the Organic Act of Alaska; does not encroach upon the admiralty jurisdiction of the United States or affect its substantial uniformity; and does not burden interstate commerce in violation of Article 1, Section 8, of the Constitution.

II.

The classification of fishermen into residents and nonresidents as contained in Chapter 66 is valid because it rests on substantial differences bearing a fair and reasonable relation to the object of the legislation.

III.

The \$50.00 license fee imposed on nonresident fishermen under Chapter 66, is reasonable and not excessive.

IV.

Chapter 66 is a valid Act, and the complaint and amended complaint should be dismissed.

Plaintiffs' Exceptions are hereby allowed.

Costs will be allowed defendant.

Done in Open Court at Anchorage, Alaska, this
18th day of April, 1950.

GEORGE W. FOLTA,

District Judge.

Approved as to form and copy received April 15,
1950.

WM. L. PAUL, JR.,

Attorney for Plaintiffs.

[Endorsed]: Filed April 20, 1950. [133]

In the District Court for the Territory of Alaska
Division Number One at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MENS' UNION,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,

Defendant.

JUDGMENT AND DECREE

The above-entitled cause came on regularly for
hearing on the 16th day of March, 1950, on the
complaint and amended complaint of plaintiffs and
the answer and amended answer of the defendant
to the complaint. Plaintiffs were represented by
their counsel, William L. Paul, Jr., of Juneau,
Alaska, and R. E. Jackson of Seattle, Washington;
defendant was represented by J. Gerald Williams,

Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence having been adduced before the court on behalf of plaintiffs and defendant and the cause having been submitted for judgment on March 16, 1950, and the court having taken the matter under advisement on that date, and having thereafter on the 21st day of March, 1950, rendered its written opinion, which was on that date filed with the Clerk of the Court; and the court, being fully advised in the premises and having heretofore made and ordered entered its findings of fact and conclusions of law; now therefore, it is hereby

Ordered, Adjudged and Decreed that Chapter 66, Session Laws of Alaska, 1949, is a valid Act; and it is further

Ordered, Adjudged and Decreed that the complaint and amended complaint filed herein be, and the same hereby are [134] dismissed; and it is further

Ordered, Adjudged and Decreed that defendant recover from plaintiffs defendant's costs in this action incurred in the amount of \$...., to be taxed by the Clerk of Court.

Plaintiffs' exceptions are hereby allowed.

Done in Open Court at Anchorage, Alaska, this 18th day of April, 1950.

GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 20, 1950. [135]

[Title of District Court and Cause.]

NOTICE OF GENERAL APPEAL

To the Clerk of the above Court:

Please Take Notice that Oscar Anderson and Alaska Fishermen's Union, plaintiffs in the above-entitled cause, hereby appeal to the United States Court of Appeal for the Ninth Circuit from a judgment and decree of the above court entered herein on the 18th day of April, 1950, and from each and every part of said judgment and decree,

Dated this 8th day of May, 1950.

WILLIAM L. PAUL, JR.,

ROY E. JACKSON,

CARL B. LUCKERETH,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 15, 1950. [136]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents; That Oscar Anderson and Alaska Fishermen's Union as principals, and the American Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto M. P. Mullaney, Commissioner of Taxation

of the Territory of Alaska, defendant above named, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, defendant, heirs or assigns, for the payment of which, well and truly to be made, we hereby bind ourselves, our, and each of our, heirs, executors, administrators, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of May, 1950, at Seattle, Washington.

The condition of the foregoing obligation is such that:

Whereas, the above-named plaintiffs have taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in said cause in the District Court for the Territory of Alaska, First Division, on the day of May, 1950, and the Cost Bond has been duly fixed in the sum of Two Hundred Fifty Dollars (\$250.00).

Now, Therefore, if the above-named plaintiffs shall prosecute said appeal to effect and answer all costs that may be adjudged against them in case they fail to make good their appeal, then this obligation shall be void, otherwise to be and remain in full force, virtue and effect.

In Witness Whereof, said principals have hereunto set their hands and seals, and the American Surety Company of New York has caused this

bond to be executed and sealed with its corporate seal by and through its duly authorized attorney in fact, on the day and year first hereinabove written. [137]

**ALASKA FISHERMEN'S
UNION,**

By **OSCAR ANDERSON,**
Principal.

**AMERICAN SURETY COM-
PANY OF NEW YORK,**
Surety.

[Seal] By **J. A. HOBSON,**
Resident Vice President.

[Endorsed]: Filed May 15, 1950. [138]

[Title of District Court and Cause.]

**DESIGNATIONS OF PORTIONS
OF THE RECORD**

To the Clerk of the District Court for the Territory of Alaska, Division No. 1, at Juneau:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, at San Francisco, with reference to the notice of appeal heretofore filed by plaintiffs-appellants in the above cause, transcript of the record in said cause, prepared and transmitted as required by law and by rules of

said court, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Complaint.
2. Amendments by interlineation.
3. Amended Answer.
4. Reporter's Transcript of Testimony.
5. Stipulated Notes of January 19, 1950, Perpetuated Testimony.
6. Opinion of Court.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Notice of Appeal.
10. Cost Bond on Appeal.
11. This designation.

/s/ WILLIAM L. PAUL, JR.,
Of Counsel for Appellant.

Copy received May 16, 1950.

[Endorsed]: Filed May 16, 1950. [139]

[Title of District Court and Cause.]

MINUTE ORDER MADE ON MARCH 14, 1950

At this time the court decreed, pursuant to argument relating to Interrogatories and submission last evening, that the objections of defendant were sustained excepting as to objection No. 3 of the set numbered 2 and 3. [140]

[Title of District Court and Cause.]

MINUTE ORDER MADE ON,
JANUARY 19, 1950

This case came on before the court for perpetuating testimony for use at the time of trial of this case, for the reason that the witnesses will not be available at the time of trial. Wm. L. Paul, Jr., appeared for plaintiff and J. G. Williams, Attorney General and his assistant, John Dimond appeared for defendant. Thereupon Carl Wiedeman, Paul Ecklund, Christofer Nelson, Chris McNeil, George Lane, Joe Bigelow and Fred Soberg were duly sworn and their testimony recorded. [141]

[Title of District Court and Cause.]

ANSWER TO INTERROGATORY NO. (3) OF
SET OF INTERROGATORIES NO. 3 PRO-
POUNDED BY PLAINTIFF ON FEBRU-
ARY 28, 1950

United States of America
Territory of Alaska—ss.

M. P. Mullaney, being first duly sworn on oath, makes the following answer to Interrogatory No. (3) of the set of Interrogatories bearing the number "3" and propounded to him in the above-entitled cause on the 28th day of February, 1950:

Answer to Interrogatory No. (3): Yes. As far as is concerned the collection of fishermen's license

taxes from nonresident fishermen. It is more difficult and expensive to perform the functions of the Department of Taxation. It has been my experience as Commissioner of Taxation for the Territory of Alaska that many nonresident fishermen each year have attempted to evade payment of the nonresident fishermen's license tax, as compared with the relatively few resident fishermen who have attempted to evade payment of the resident fishermen's license tax. This situation, together with the fact that nonresident fishermen have no places of residence in the Territory, that they are within the jurisdiction of the Territory only for a very brief period of time each year and that for the great majority of that time are engaged in fishing, necessitating my sending an enforcement officer to the various fishing areas in Alaska each year in an attempt to enforce payment of the license tax against the nonresident fishermen. [142]

With reference to inheritance and transfer taxes, coin-operated amusement and gaming devices, motor fuel oil tax, return or refund of taxes, or any other Territorial taxes not solely concerned with fishermen in Alaska, I do not know whether or not it is more difficult and expensive to perform the functions of the Department of Taxation insofar as fishermen are concerned, due to the fact that such fishermen may be nonresidents. The reason for this is that no records of the Department of Taxation are maintained showing the status of

those paying such taxes, that is, whether they are fishermen, either resident or nonresident.

M. P. MULLANEY.

Subscribed and sworn to before me this 15th day of March, 1950.

[Seal]

FLORENCE B. OAKES,

Notary Public for Alaska.

My commission expires: 1/10/53

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1950. [143] ✓

[Title of District Court and Cause.]

**ANSWERS TO INTERROGATORIES PRO-
POUNDED BY PLAINTIFF ON FEBRU-
ARY 4, 1950**

United States of America
Territory of Alaska—ss.

M. P. Mullaney, being first duly sworn on oath, in reply to the interrogatories propounded to him by plaintiff in the above-entitled cause on the 4th day of February, 1950, says:

1. Answer to Interrogatory No. 8: I am unable to submit an allocation of the cost of the services necessary and usual for the collection of the taxes mentioned in Interrogatories Nos. 1 through 7. Considering the myriad items and the various operations involved in the collection of license taxes

from fishermen in Alaska, a statistical analysis of the type requested by plaintiff would be virtually impossible due to the fact that my records are not maintained in a manner which would reflect the information requested.

2. Answer to Interrogatories Nos. 9 through 11: I am unable at this time to submit a comparative analysis of the amount of fishermen's license taxes collected directly from the fishermen and the amount collected through the canneries for the reason that statistics of this type, the preparation of which involves considerable time and detailed work, are not maintained on a perpetual basis.

3. Answer to Interrogatories Nos. 12 and 13: I am unable to answer these two interrogatories since I have no way of determining [144] the definite number of either resident or nonresident fishermen who engage in fishing in Alaska each year, and therefore I have no way of determining how many of those who fish evade payment of the license tax.

M. P. MULLANEY.

Subscribed and sworn to before me this 13th day of March, 1950.

[Seal]

FLORENCE B. OAKES,

Notary Public for Alaska.

My commission expires Jan. 10, 1953.

Copy Received, March 13, 1950.

[Endorsed]: Filed March 13, 1950. [145]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF

No. 1

(1) Attached hereto is a statement of licenses and taxes collected by the Department of Taxation of the Territory of Alaska. Will you please identify this as an official document of the Territory of Alaska?

(2) What services are necessary and usual in the Department of Taxation for the collection of Fishermen's licenses resident?

(3) What services are necessary and usual in the Department of Taxation for the collection of Fishermen's licenses nonresident?

(4) What services are necessary and usual in the Department of Taxation for the collection of Gillnets operated by resident fishermen?

(5) What services are necessary and usual in the Department of Taxation for the collection of Gillnet tax from nonresidents?

(6) What services are necessary and usual in the Department of Taxation for the collection of Seines operated by resident fishermen?

(7) What services are necessary and usual in the Department of Taxation for the collection of the tax on Seins operated by nonresidents?

(8) If it is possible from your records, please

allocate the cost of the services necessary and usual for the collection of the taxes mentioned in the Interrogatories, Nos. (1) through (7) for 1948.

(9) Please state the amount of fishermen's licenses taxes on residents actually collected directly from the fishermen for 1948? [146]

(10) Please state the amount of fishermen's licenses taxes on residents collected through canneries for 1948?

(11) Please state the same information as mentioned in the two interrogatories next-above with regard to nonresidents?

(12) What is the percentage or amount, whichever you prefer to state, of resident fishermen's licenses taxes which is not collected by your Department of Taxation because of concealment or avoidance in some manner by the tax payer?

(13) State the same information, if you are able to do so, with regard to the nonresident fishermen's license tax?

Submitted by:

/s/ WILLIAM L. PAUL, JR.,

Attorney for Plaintiff.

Copy Received Feb. 6, 1950.

[Endorsed]: Filed February 6, 1950, [147]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF

No. 2

(1) Has your Tax Department had any difficulty in securing land registration, and/or payment of taxes on land owned by nonresident fishermen? The taxes referred to in this interrogatory are those provided for at Section 22-2-1, ACLA 1949. And if your Tax Department had had such difficulty, describe the cost thereof and whether taxes have been collected in spite of such difficulty.

(2) Has the Department of Public Welfare expended any sums for the support of children of non-resident fishermen who have violated Section 21-3-1, ACLA 1949? If so, state the amount.

(3) How does the amount expended, named in the next question above, if any such amount, compare with the amount expended by the Department of Public Welfare for the support of children of resident fishermen who violate the same section?

(4) Has the Territory been put to any expense in the payment of or removal of false and fraudulent liens by nonresident fishermen, which liens are mentioned in Title 26, ACLA 1949? If so, state the amount of expense of payment or removal of such liens.

(5) Has the Territory been put to any extra expense as compared to resident fishermen, to effect the collection of negotiable instruments given to it

by nonresident fishermen? If so, state the amount.

(6) Is it more difficult and expensive for the Alaska Aeronautics and Communications Commission to administer and the Department of Taxation to pay for the administration of Title 32, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Alaska Aeronautics and Communications Commission, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(7) Is it more difficult and expensive for the Department of Agriculture to administer and the Department of Taxation to pay for the administration of Title 33, Chapter 1, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Department of Agriculture, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(8) Is it more difficult and expensive for the Territorial Banking Board and Territorial Banking Department to administer and the Department of Taxation to pay for the administration of Title 34, Chapter 3, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Territorial Banking Board and Territorial Banking Department, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(9) Is it more difficult and expensive for the Board of Accountancy, the Board of Territorial Law Examiners, the Unauthorized Practice of Law, Collection Agencies, Copyrighted Works, Cosmetology, Elbalmers, Engineers and Architects, Hotels and Boarding Houses, Junk Dealers and Metal Scrappers, Lobbyists, Second Hand Dealers and Pawn Brokers, Board of Examiners in the Basic Sciences, Board of Chiropractic Examiners, Dentistry, Drugs and Pharmacists, Territorial Medical Board, Nurse's Examining Board, Board of Examiners of Optometry, Board of Liquor Control, Inspector of Weights and Measures to Administer and [149] the Department of Taxation to pay for the administration of Title 35, ACLA 1949 insofar as fishermen, making use of facilities afforded by the above agencies, etc., is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(10) Is it more difficult and expensive for the Auditor of Alaska (with respect to Corporations of an ordinary business nature, and also with respect to his functions as Insurance Commissioner) to administer and the Department of Taxation to pay for the administration of Title 36, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Auditor of Alaska (Corporations and Insurance Commissioner) is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(11) Is it more difficult and expensive for the Territorial Board of Education, Territorial Commissioner of Education and the Territorial Department of Education to administer and the Department of Taxation to pay for the administration of Title 37, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Territorial Board of Education, the Territorial Commissioner of Education and the Territorial Department of Education, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(12) Is it more difficult and expensive for the Attorney General to administer and the Department of Taxation to pay for the administration of Sec. 38-3-6, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Attorney General, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. [150]

(13) Is it more difficult and expensive for the Department of Health, the Uniform Narcotic Drug Act, the Sale of Diseased, Corrupted or Unwholesome Provisions, the Hospital Licensing Agency, the Alaska Housing Authority, Lost Persons, Pollution of Waters or Air, Shelter Cabins and Comfort Stations, Vital Statistics, Highways, Trails, Bridges and Ferries, the Territorial Board of Road Commissioners, and the Highway Engineer to ad-

minister and the Department of Taxation to pay for the administration of Title 40, ACLA 1940, insofar as fishermen, making use of facilities afforded by the above agencies, etc., is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

Submitted by:

/s/ WILLIAM L. PAUL, JR.,
Attorney for Plaintiff.

Copy received Feb. 28, 1950.

[Endorsed]: Filed February 28, 1950. [151]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF No. 3

(1) Is it more difficult and expensive to perform the functions of the Territorial Department of Labor, including the Alaska Industrial Board, set forth in Title 43, ACLA 1949, including functions with regard to inspections and collections of statistics, preference of employment of residents, collection of wages, maximum hours of and minimum wages of women, Workmen's Compensation, and arbitration, and the Department of Taxation to pay for such administration insofar as fishermen, making use of the aforementioned functions, are concerned, due to the fact that such fishermen may

be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(2) Is it more difficult and expensive to perform the functions of the Alaska World War II Veterans Board and the Department of Taxation to pay for such administration insofar as fishermen, making use of the aforementioned functions, are concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(3) Is it more difficult and expensive to perform the functions of the Department of Taxation, not herein otherwise specified, insofar as fishermen are concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. Your attention is specifically called to inheritance and transfer taxes, coin-operated amusement [152] and gaming devices, motor fuel oil tax, and return or refund of taxes.

(4) Is it more difficult and expensive for the proper enforcement of Section 49-2-1 et seq., relating to Utility and School Districts, and the Department of Taxation, insofar as fishermen, attempting to make use of the rights and privileges afforded by such Act, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists, from the fact of nonresidency, state what it is.

(5) Is it more difficult and expensive for the Board of Road Commissioners to administer and the Department of Taxation to pay for the administration of Title 50, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Board of Road Commissioners, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. This interrogatory includes that portion of Title 50, ACLA 1949, relating to ownership certificates of vehicles, and licensing of the same, operation of vehicles, offenses committed by the owners of vehicles.

(6) Is it more difficult and expensive for the Department of Public Welfare to administer and the Department of Taxation to pay for the administration of Title 51, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Department of Public Welfare, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. This interrogatory includes the facilities and money paid to destitute and needy persons generally, and to the Pioneer's Home, aid to dependent children, Old Age Assistance, and burials, juveniles, insane persons.

(7) Is it more difficult and expensive for the Employment Security Commission to administer and the Department of Taxation to pay for the administration of Title 51, Ch. V., ACLA 1949, insofar as fishermen, making use of facilities afforded

by the Employment [153] Security Commission, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

Submitted by

/s/ WILLIAM L. PAUL, JR.,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1950. [154]

PLAINTIFF'S WAIVER

William L. Paul, Jr., Attorney-at-Law,
Juneau, Alaska

February 4, 1950.

Attorney General of Alaska,
Juneau, Alaska

Re: Plaintiff's Interrogatories in
Anderson v. Alaska

Dear Sir:

Pursuant to our conference of yesterday, plaintiff hereby waives direct answer to interrogatories one through seven for the reason that the information requested therein is better obtained in oral testimony of the officials of the Department of Taxation.

Yours very truly,

/s/ WILLIAM L. PAUL, JR.,
Of Plaintiff's Attorneys.

[Title of District Court and Cause.]

**SUPPLEMENTAL DESIGNATION OF
THE RECORD**

To the Clerk of the District Court for the Territory
of Alaska:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit at San Francisco, with reference to the notice of appeal heretofore filed by appellants in this cause, transcript of the record in said cause, prepared and transmitted as required by law and by rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. Journal entry at page 385, of March 14, 1950.
- 1a. Journal entry in Journal 19 at page 362, of January 19, 1950.
2. Defendant's Answer to Interrogatory No. 3, filed March 15, 1940.
3. Defendant's Answer to Interrogatories filed March 13, 1950.
4. Plaintiff's Interrogatories numbered 1, 2 and 3.
5. Plaintiff's Waiver of February 4, 1950.
6. This Supplemental Designation.

/s/ WILLIAM L. PAUL, JR.,
Of Appellants' Counsel.

cc. mailed to Attorney General 5/19/50.

[Endorsed]: Filed May 19, 1950. [156]

[Title of District Court and Cause.]

STATEMENT OF POINTS

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article 1, Section 8, and Article 3, Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.

2. The finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax from nonresident fishermen is required to collect or enforce the same is not substantiated under the testimony and evidence.

3. Conclusion number one (I) of the District Court that Chapter 66 of the Session Laws of 1949, Laws of Territory of Alaska, does not contravene the Organic Act and United States as enumerated in Point 1, is wrong. [157]

4. Conclusion number two (II) of the District Court that Chapter 66 of the Session Laws of 1949 is valid because it rests on substantial differences bearing a fair and reasonable relation to the object of the legislation, is wrong.

5. That Conclusion number three (III) that the \$50.00 license fee imposed on nonresident fishermen

under Chapter 66 is reasonable and not excessive, is wrong.

6. That Conclusion number four (IV) of the District Court that Chapter 66 is a valid Act, and the complaint and amended complaint should be dismissed, is wrong.

7. That the judgment and decree entered in said cause dismissing the complaint and amended complaint is in error.

/s/ WILLIAM L. PAUL, JR.,
Of Counsel for Appellants.

[Endorsed]: Filed May 24, 1950. [158]

[Title of District Court and Cause.]

STIPULATION TO CORRECT TRANSCRIPT OF TESTIMONY

It is hereby stipulated by the parties, acting through their respective counsel that the transcript of testimony may and hereby is corrected as follows (all page and line numbers are to original transcript):

1. In line 6 on page 39, change 26 to 36.
2. In line 3 on page 42, change "trap to clean up its gear" to "cannery to clean up its gear"; and change "to get the trap beached" to "to get the traps beached."
3. In line 17 on page 57, change as to by.

And that this stipulation is to be regarded as parts of the designations of portions of the record to be printed previously made by the parties.

WILLIAM L. PAUL, JR.,

Of Appellants' Attorneys.

JOHN H. DIMOND,

Of Appellee's Attorneys.

[Endorsed]: Filed June 20, 1950. [159]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION, a Labor Union Acting on
Behalf of a Certain of Its Members,

Plaintiffs,

vs.

M. P. MULLANEY, Commisniener of Taxation of
the Territory of Alaska,

Defendant.

REPORTER'S TRANSCRIPT
OF RECORD

Be It Remembered, that on the 16th day of March, 1950, at 10:00 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for hearing, the Honorable George W. Folta, United States District Judge, presiding; the plaintiffs appearing

by William L. Paul, Jr., their attorney; the plaintiff Oscar Anderson appearing in person; the defendant appearing by J. Gerald Williams, Attorney General of the Territory of Alaska, and John Dimond, Assistant Attorney General of the Territory of Alaska;

Whereupon, the following occurred:

Mr. Paul: I have agreed orally with counsel to a stipulation in open court, for it has not been our intent or desire to maintain this action against the Territory of Alaska, and I think that counsel on both sides assumed all along that [1*] the action was against M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, and counsel may indicate at this time if he agrees in open court that M. P. Mullaney, as Commissioner of Taxation of the Territory of Alaska, may be substituted in place of the Territory of Alaska as defendant.

Mr. Williams: That is agreeable with the defense, your Honor.

The Court: Well, the case then will be continued in the name of M. P. Mullaney as defendant.

Mr. Paul: There should be then, your Honor, a change in the description in Paragraph I of the body of the Complaint.

The Court: Well, you may make whatever amendments a change of that kind would require.

Mr. Paul: Just a formal description is all.

Whereupon, William L. Paul, Jr., attorney for plaintiffs, made the opening statement in behalf

* Page numbering appearing at bottom of page of original Reporter's Transcript.

of plaintiffs; and no statement was made in behalf of defendant.

Whereupon, the trial proceeded as follows:

PLAINTIFFS' CASE

OSCAR ANDERSON.

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows on

Direct Examination

By Mr. Paul:

Q. Your name is Oscar Anderson, is it?

A. It is. [2]

Q. And you are described in the pleadings of this case as Oscar Anderson. Mr. Anderson, do you occupy any position with the Alaska Fishermen's Union now? A. I do.

Q. How long have you been a member of the Alaska Fishermen's Union?

A. Thirty years on the 10th of next month.

Q. How long have you been Secretary-Treasurer of the Alaska Fishermen's Union?

A. One year.

Q. You have been a Branch Agent also?

A. Yes. I was Branch Agent for eight years.

Q. And what Branch?

A. Seattle Branch.

Q. How many Branches does the Alaska Fishermen's Union have?

A. We have six Branches.

(Testimony of Oscar Anderson.)

Q. And what are their locations?

A. San Francisco, Portland, Bellingham, Ketchikan, Anchorage and Dillingham.

Q. Dillingham?

A. Dillingham. It is in Bristol Bay.

Q. About how—well, now about how many members does your union have?

A. At the end of the year we had five thousand two hundred and some members. [3]

Q. Are they residents and nonresidents mixed in together? A. Yes.

Q. Now, Mr. Anderson, did this question of payment of taxes, that we are concerned with, come up before your members in the Branches?

A. Yes; in the Branches and headquarters as well.

Q. Was there any action taken by the various Branches?

A. Yes. They recommended to headquarters that we take this matter to court to determine whether there is discrimination against nonresidents.

Q. When I say "Branches," I mean was there action taken by all Branches?

A. Yes; as far as I can remember. I don't know what action was taken in the Dillingham Branch as that Branch does not meet very regularly—now and then.

Q. Is this your testimony, that the Anchorage, Ketchikan and the three states' Branches all considered this matter?

(Testimony of Oscar Anderson.)

A. Yes. They approved the action of—taken in Branch meetings and at headquarters.

Q. Now, do you know—first, let's put it this way. Have the nonresident fishermen members of your union paid the fifty-dollar tax?

A. If they have paid it?

Q. Have they paid it?

A. Yes, they have paid it. [4]

Q. Do you know ~~some~~ particular men who have paid it that you can name off?

A. Well, I would say they are all paid, of course. I can name certain fellows, of course.

Q. Did you make up a little list here a couple days ago? A. Yes.

Q. Handing you this list, can you tell whether those men, being members of your union, have paid the nonresident fishermen's tax?

A. All paid. They worked at canneries where they deduct the license.

The Court: Maybe it is something that could be stipulated anyhow, isn't it?

Mr. Paul: Yes. I was going to read it in the record. As long as the names are so hard to spell, I can give it to the Court Reporter.

The Court: If the defendant is willing to stipulate that fishermen, not necessarily these named but generally, have paid the tax, why that obviates the necessity of proving payment by specific persons.

Mr. Williams: The defendant is willing to stipulate that some nonresident fishermen have paid, but

(Testimony of Oscar Anderson.)

whether or not these men have paid we are not willing to stipulate at the present time without checking the records of the tax—

Mr. Paul: My main purpose is—members of this [5] Alaska Fishermen's Union, nonresident fishermen, have paid the tax. If counsel wants to stipulate that some members of this Union have paid the nonresident license tax—

Mr. Williams: We would even be willing to stipulate that some members of this Union have paid the tax.

The Court: Let the record so show.

Q. Now, you have been Branch Agent of the Seattle Branch for eight years and Secretary-Treasurer for one year? A. Yes.

Q. Have you occupied any other position in your union?

A. Yes. Oh, several years I have been cannery delegate.

Q. Can you give us an approximate idea how many years you have been cannery delegate?

A. Except to say I have been cannery delegate at least twelve, fourteen years out of the time I have been fishing in Alaska.

Q. While you were Branch Agent and Secretary-Treasurer you have not actually been doing any fishing yourself? A. No.

Q. The rest of the time did you do fishing in Alaska? A. Yes.

Q. What kind? A. Salmon.

(Testimony of Oscar Anderson.)

Q. Gill netting or—

A. Gill netting; and prior to that, before I became a member [6] of the Alaska Fishermen's Union, I worked in the Southeastern District here.

Q. What kind of a job?

A. I was working on the traps one year, and I was gill netting in Taku here two years.

Q. Most of the rest of the time you have been gill netting up at Bristol Bay? A. Yes.

Q. Now, what do the members of your union do, what kind of work, Mr. Anderson?

A. Where? In Alaska?

Q. Yes.

A. Our contract provides that—

Q. Just name it generally. A. Fishing.

Q. Gill netting in Bristol Bay? A. Yes.

Q. What about tendermen and trapmen?

A. They work on the traps; certain men work on the traps and some on the tenders.

Q. And do you have some culinary workers too on floating equipment?

A. Yes, we have culinary workers.

Q. About how many of your members are resident Alaskans?

A. It is safe to say that about not less than in the neighborhood [7] of two thousand men actually fishing, in the culinary department and on the tenders, are mostly nonresidents.

Q. My question is, how many of your five thousand two hundred members are resident Alaska fishermen?

(Testimony of Oscar Anderson.)

A. I would judge approximately two thousand.

Q. And about how many of your fifty-two hundred members are nonresident Alaska fishermen?

A. Just about, pretty much about half, that are actually fishing; yes, either on traps or gill netting.

Q. That would mean about sixteen hundred nonresident fishermen? A. Yes.

Q. Have you ever had occasion to become familiar with other methods of fishing and other activities of other unions in the fishing industry in Alaska?

A. Yes. I am pretty well acquainted with any kind of fishing that goes on on the coast here.

Q. How have you been familiar?

A. I am in constant contact with them more or less, and I also done other kinds of fishing after the Alaska fishing season was over.

Q. I am still talking about Alaska fishing. I don't care about down below. How have you become familiar with the practices of the Alaska fishing industry in other unions?

A. Well, every year we hold coordinating meetings, get together [8] on different operations of gear and discuss the fishing problems together.

Q. They have these coordinating fishing meetings, do they, in Seattle? A. Yes.

Q. Every year? A. Several times a year.

Q. First let me identify your position a little more. Who is the executive officer and business manager of your union?

(Testimony of Oscar Anderson.)

A. I am at this time.

Q. That is, Secretary-Treasurer?

A. Secretary-Treasurer; yes.

Q. Really the boss, you might say?

A. Yes.

Q. And in such position or as Branch Agent you have conducted collective bargaining negotiations?

A. Yes. When there is negotiation of a contract the Branch Agent always is in the negotiation.

Q. And the Secretary-Treasurer is really the one that gets the thing moving? A. Yes.

Q. What are some of these other unions in Alaska insofar as fishing is concerned?

A. Purse Seiners. [9]

Q. United Fishermen of the Pacific?

A. United Fishermen of the Pacific, yes. And then the trollers, and the trollers, nonresident trollers, are mostly members of the Cooperative.

Q. They have a business cooperative?

A. Yes; they have some kind of a cooperative.

Q. Do you know if that cooperative acts in Alaska or do the trollers sell in the open market?

The Court: Is all this material here?

Mr. Paul: I was laying a foundation, and I am about through laying the foundation. I am about to ask what nonresidents come to Alaska, how they mix in or don't, and following my theory of the case—

The Court: You mean they are all members of this union?

(Testimony of Oscar Anderson.)

Mr. Paul: No. There will be these other unions—a good deal less than the Alaska Fishermen's Union does—that enter into it.

The Court: How?

Mr. Paul: They send nonresident fishermen up here.

The Court: They are not in the case.

Mr. Paul: I judged the case to involve the description of a class, your Honor, of the activities of a class, of nonresident fishermen whether they belong to this union or any other union. [P0]

The Court: They have to stand on their own feet, not somebody else's. They are the plaintiffs.

Mr. Paul: Since the Alaska Fishermen's Union does not constitute the entire class, testimony relating solely to the Alaska Fishermen's Union members might not be representative of the entire class, and I will be engaged in showing—

The Court: That may be; but you have only the one plaintiff here. That is the Alaska Fishermen's Union. So it seems to me what activities the members of other unions might have would not be relevant here.

Mr. Paul: Just so far as they fit into the class. If the Court feels it is immaterial, I am only too happy to shorten the testimony.

The Court: I think it is immaterial unless it develops upon the hearing that it is material and then the Court will let you go into it, but I don't think it is material.

(Testimony of Oscar Anderson.)

Mr. Paul: All right.

Q. Mr. Anderson, we will just confine the questions to the Alaska Fishermen's Union. How are nonresident fishermen hired for fishing in Alaska?

A. They apply to the company for the jobs.

Q. You have no hiring hall?

A. No, we have no hiring hall.

Q. Is there any preference of hiring that the companies follow? [11]

A. No. Naturally all the employees who have been satisfactory always get their job back; but if any employees are not desirable they send them notice by December 31st that they are not wanted for the following season.

Q. What is the labor turnover among nonresident fishermen per year?

A. It is very little; probably ten per cent would be about the most.

Q. What is the cause of the labor turnover, do you know?

A. Well, either that a man for one reason or another may not feel like going to Alaska, or maybe sickness in the family, or one thing or another.

Q. What is the larger cause for the turnover?

A. Well, I will say it would be that—that is pretty hard for me to say what is the reason, but there is many things could enter into that that a man cannot even go to Alaska.

Q. Death?

A. Death, sickness, or a better job for that year, or something of that kind.

(Testimony of Oscar Anderson.)

Q. When a man is employed by a canning company to come to Alaska, is he required to take a physical examination?

A. Yes; very strict; more so now.

Q. Who gives the examination?

A. They have an industry doctor, a doctor that examines all employees for all canneries. [12]

Mr. Williams: Your Honor, I would like to object to this line of testimony unless we can tie it into the case—ten per cent turnover, physical examinations, they are not material.

The Court: The turnover might be relevant, but the causes of the turnover and any testimony with reference to physical examinations, I don't think that is material.

Mr. Paul: It might be material in this sense, that if the industry is very careful to send healthy capable men, healthy from the standpoint of taking advantage of hospitals provided by the Territory—

The Court: The only thing that would be shown is that they have superior physiques to residents if you can show anything like that. I think the objection will have to be sustained.

Q. Now, with respect to—how do these men get to Alaska, nonresident fishermen/members of your union?

A. At this time they are mostly flown into Alaska.

Q. They leave Seattle. Do they stop at any point en route to Bristol Bay?

(Testimony of Oscar Anderson.)

A. They have gone directly pretty much from Seattle to Naknek Airbase, but it happens occasionally that they have stopped at Yakutat, that is the only place, if they had to stop for something.

Q. What would they stop at Yakutat for? [13]

A. Probably—I couldn't tell.

The Court: I think that is going far afield.

Mr. Paul: We can show, your Honor, that these men virtually never come into contact with any Territorial office or any of the facilities provided by the Territory.

The Court: You are showing the opposite when you show they stop at Yakutat and what for.

Mr. Paul: The next question will be—how long.

The Court: Having brought out that they stop at Yakutat, which is not necessary, you are put in the position of extricating yourself from any unfavorable inferences, so preliminarily I think it is sufficient that they are flown to Naknek and occasionally stop en route, but why or how—I feel I have to impose some limit here because of a lack of time.

Mr. Paul: I appreciate that, your Honor. I am only trying to be quite fair in presenting a complete picture of the events.

Q. They go almost invariably to Naknek, as you testified? A. Yes.

Q. Who operates Naknek Airbase?

A. The Federal Government.

Q. Do you know of any hospital or anything in

(Testimony of Oscar Anderson.)

connection with Naknek Airfield? A. None.

Q. Who maintains the messhouse? [14]

A. Alaska Salmon Industry.

Q. Where are the men transported when they land at Naknek Airbase and how?

A. They take them down on power scows or also they fly some to remote canneries up there by airplane.

Q. The employer does that? A. Yes.

Q. Do any of these men bring their families up here with them— A. No.

Q. Women and children? A. No.

Q. After the men arrive at the individual canneries who provides board and room and other facilities? A. The company who they fish for.

Q. That includes living, sleeping and eating quarters? A. Everything.

Q. Everything that the men probably need?

A. Yes.

Q. Just to shorten this up a little—are there established contracts which govern all these relations between your union and the Alaska Salmon Industry's canneries?

A. I beg your pardon?

Q. Are there contracts which define all these things? A. Yes. [15]

Q. Are the men up there allowed to draw any money during the season?

A. No; that is, it is very seldom that money is drawn.

(Testimony of Oscar Anderson.)

Q. Is there any policy that you know of pursued by the Alaska Salmon Industry or the canneries up there regarding the use of liquor?

A. They are very strict now not to permit any liquor in the canneries.

Q. And if liquor is found at the canneries what do they do?

A. In many cases the employee is discharged if found to be using liquor during the fishing season.

Q. If an employer suspects that a request for money is made to obtain liquor, is there anything done? What do the canneries do about that?

A. He won't get any.

The Court: Do the employees ever admit it is for liquor?

A. Well, I don't believe they would tell the superintendent they want it for liquor; no.

Q. Has your union any policy with respect to the use of liquor during the fishing season at Bristol Bay?

A. What is that?

Q. Does your union have any policy with respect to the use of liquor during the fishing season up in Bristol Bay?

A. Yes. If drinking is going on the members would object to [16] it and report it to the superintendent.

Q. Does your union have any policy with respect to violations of any other law; for instance, like the use of small mesh nets?

A. Yes. We impose a fine of two hundred and fifty dollars for anyone caught with illegal gear.

(Testimony of Oscar Anderson.)

Q. In recent years have you heard of violations by your members in Bristol Bay?

A. No. They live up to it pretty strict.

Q. Would it come to your attention?

A. Yes, it would. If anyone was fined during the season, it would be reported to the membership and what company.

Q. The fishermen check up on themselves?

A. Yes.

Q. Is that easy to do up there?

A. Yes. That is pretty strict that way.

Q. Well, the bay is so wide open everybody can see everybody else, can't they?

A. Yes. It is daylight up there so, if it is early in the morning or late at night when a closed period comes in, we can see whether a boat is fishing or not.

Q. Now, if there is any problem of the excessive use of liquor or drunkenness—

The Court: Isn't all this part of the rebuttal?

Mr. Paul: We are carrying the burden of proof, and [17] in that sense the positions are reversed, so that one might say ordinarily this would be rebuttal except we have to carry the burden of attacking the statute.

The Court: You take the position that you have to negative the existence of any basis for classification?

Mr. Paul: Yes.

The Court: All right.

Q. If there were any problem of the excessive

(Testimony of Oscar Anderson.)

use of alcohol or drunkenness either among individual members of your union or among a group of members of your union, would that fact come to your attention? A. Yes.

Q. As Secretary-Treasurer of your union?

A. Yes. I may state that the liquor store in Bristol Bay is closed during the fishing season.

Q. At these canneries are there any medical or hospital facilities? A. Yes.

Q. Who provides them?

A. The company.

Q. That is part of your contract? A. Yes.

Q. What do these medical and hospital facilities consist of?

A. They have small hospitals and with planes, if there are any serious cases, they may take them to Anchorage. Fishermen [18] living or fishing on Kvichak River fly to Anchorage.

Q. Is there any doctor connected with these small hospitals?

A. Yes; young doctors mostly; mostly first aid. No operations are performed at those hospitals. If they require an operation, they are sent to Dillingham or Anchorage, but mostly to Anchorage.

Q. Does your contract with the industry provide for any benefits in case of sickness or injury?

A. It provides for medical and hospital care.

Q. What about pay?

A. A fisherman, if he is sick or injured, or if he is sick after half of the red salmon season is

(Testimony of Oscar Anderson.)

over, then he gets an average of the fish caught for the remainder.

Q. An average? A. Yes.

The Court: Of this particular union, or is that the practice of the Alaska Salmon Industry?

A. No. Particularly this union.

Q. Are there any fishermen in Bristol Bay, residents or non-residents, who are not members of your union?

A. No. They are all members of the union.

Q. One hundred per cent? A. Yes.

Q. Now, when you say "average," what do you mean?

A. If they figured up how much fish was caught from that date [19] and then divided it up among so many boats fishing, and you derive an average from there.

Q. Is there one or two averages for each cannery? A. Only one.

Q. Residents and nonresidents are averaged together? A. There is only one average.

Q. To compute the earnings? A. Yes.

The Court: You mean—oh, for the purpose of this average.

Mr. Paul: The purpose of this average apparently is to pay the average to sick fishermen.

The Court: Oh.

A. Yes.

Q. Suppose a fisherman is injured; does the same rule apply?

(Testimony of Oscar Anderson.)

A. No. Then it comes under the Alaska Workmen's Compensation Act.

Q. Is that in the contract you have with the industry?

A. We have it in the contract, yes, as far as a fisherman is concerned, but a tenderman, he can choose to be covered either by the Jones Act or the Alaska Workmen's Compensation Act.

Q. Is that in the contract?

A. That is in the contract.

Q. When was that first in the contract? [20]

A. A year ago.

Q. Nineteen— A. 1949.

Q. Suppose the fisherman or a tenderman up in Bristol Bay, a member of your union, gets fired at any time during the season, at any time while he is in Alaska, what is the employer required to do, if anything?

A. Provide him with transportation out of the Territory.

Q. Back to Seattle?

A. Back to the Port of Embarkation.

Q. That is Seattle?

A. One hired in Anchorage would be shipped back to Anchorage.

Q. So far as a nonresident fisherman is concerned, it means usually that he would go back to Seattle?

A. He goes to Seattle.

Q. Are there any canneries up in Bristol Bay not members of the Alaska Salmon Industry?

(Testimony of Oscar Anderson.)

A. No. All are members of the Alaska Salmon Industry that operates in Bristol Bay.

Q. Do the canneries have any policy of transporting men who quit any time during the season?

A. Yes. They send them back to where they were hired.

Q. Do you know if they follow that policy?

A. Strictly.

Q. And at whose expense do they go outside when they quit? [21]

A. The company's.

Q. When they quit voluntarily?

A. Oh. If they quite voluntarily, then they have to provide their own transportation.

Q. So there is no misunderstanding—when a man quits voluntarily, do the companies have any policy of shipping the man back to the Port of Embarkation?

A. Yes. They mostly provide or arrange for transportation to get out of the Territory.

Q. Even though at the man's own expense?

A. Yes.

Q. Now, at the end of the season you have, I believe, what we call the fall run money work.

A. Yes. Spring and fall run money.

Q. About how long does the fall run money last for nonresident fishermen?

A. It takes approximately ten days to load out the pack if it is an ordinary season.

Q. Do you have any problem of nonresident

(Testimony of Oscar Anderson.)

fishermen quitting during the fall run money work?

A. No. They stay pretty well until it is done otherwise they will forfeit the run money.

Q. The one hundred dollars? A. Yes.

Q. Is there any problem of resident fishermen quitting or not [22] doing the fall run money work?

A. Yes. We had a considerable lot of those cases.

Q. Do you know why residents quit or fail to work the fall run money work?

A. Some probably wanted to go and have something to drink, and that is the reason in many cases.

Q. Now, when the fall run money work is over, what do the companies do with the men?

A. The nonresidents?

Q. Yes. A. Send them home.

Q. The same way as they came up?

A. Yes.

Q. When are the men paid?

A. The resident fishermen are paid up—

Q. I don't care about the residents. Let's have the nonresidents.

A. They are paid off at the Port of Embarkation. They are supposed to be paid off within forty-eight hours after arrival at the Port of Embarkation.

Q. Do the nonresident fishermen or other non-resident members get any shore money?

A. Yes. They get ten dollars shore money or twenty.

(Testimony of Oscar Anderson.)

Q. Where and when is that money given them?

A. Just before arrival at the Port of Embarkation. [23]

Q. In other words, on the airplane just about as they arrive at Seattle why ten dollars apiece or twenty is passed out?

A. When they fly it is passed out at Naknek airbase, and some are given that money just when they are ready to leave the cannery and one member is designated as paymaster and pays the men when they arrive at the airfield in Seattle.

Q. What is the dispersion of resident and non-resident fishermen at any particular cannery?

A. Dispersement?

Q. Fifty-fifty; forty-sixty; or what?

A. Pretty much fifty-fifty; that is, actually fishermen.

Q. What about tendermen who tend to the fish boats and tow them around?

A. Well, they are pretty much nonresidents; yes.

Q. I have been talking about Bristol Bay a good deal. You have, I believe, members in Southeastern Alaska, too? A. Yes.

Q. What kind of work—they are tendermen and trapmen? A. And culinary workers.

The Court: You mean your members are limited to Bristol Bay and Southeastern Alaska?

A. No. All over Alaska; westward, canneries located on the south side of the Peninsula and the

(Testimony of Oscar Anderson.)

Shumagin Islands. That is what we call the Westward District, and then Cook Inlet. [24]

The Court: You might say your members are distributed all over Alaska?

A. Yes, all over Alaska.

Q. Now, with respect to the tendermen and trapmen in Southeastern Alaska, what proportion of nonresidents are there among those two classes of workmen who are members of your union?

A. I will say there is more nonresidents.

Q. About how many nonresidents are there? I think you gave a figure of sixteen hundred.

A. Yes, I would judge just about probably; that takes in the Southeastern trapmen.

Q. I will put it the other way. How many resident trapmen and tenderman are there in Southeastern Alaska?

A. Well, it is rather difficult. There is not so many. They mostly, when the fish season starts, they either do purse seining or—mostly purse seining.

Q. Well, would a figure, say, of one hundred resident tendermen and trapmen be pretty close to a correct figure?

A. Well, I would say probably that the resident people would be about one-third of the trapmen and tendermen.

The Court: I don't quite get this. You mean residents would constitute one-third of the trapmen and tendermen?

(Testimony of Oscar Anderson.)

A. Yes; here in Southeastern Alaska.

The Court: Well now, when you speak of tenders—you [25] mentioned purse seiners a while ago—you don't include purse seiners?

A. No. No. Tenders. We have what we call tenders that tend to the traps and brail the traps and so on; in other words, service the canneries.

The Court: Well, are there tenders that do any other kind of work in connection with the operation of a cannery than tending to traps or brailing?

A. No; that is all.

Q. Then about five hundred residents and about a thousand nonresidents are tenderman and trapmen?

A. Yes. It will probably vary a little bit one way or another, but that is just about what it would be.

Q. Do you know of any tendermen or trapmen in Southeastern Alaska who are not members of your union?

A. No. We have pretty well everybody—members of our union.

Q. Now, with respect to the transportation of—first, let's ask this question. Do you have a contract between your union and the Alaska Salmon Industry covering trapmen and tendermen in Southeastern Alaska? A. Yes.

Q. Now, I would like to hurry over this as much as possible. I want to ask you the same questions I did before about how these men—the nonresident

(Testimony of Oscar Anderson.)

trapmen and tendermen—are hired and how they get up here. [26]

A. They are hired in Seattle.

Q. Yes. Let me ask you this question first. Do you know of any substantial difference in the method of hiring and firing and transportation between what you have testified about the Bristol Bay fishermen and what actually goes on about tendermen and trapmen in Southeastern Alaska?

A. It is practically the same.

Q. Is there this difference, that the men when they come up in the airplanes generally touch at one of the larger towns? A. Yes.

Q. Like Ketchikan? A. Yes.

Q. Or Juneau?

A. Yes. The tendermen, they mostly come up on tenders from Seattle because the tenders are taken back to Seattle in the fall, and so the tendermen come up on a regular tender, cannery tenders, but the trapmen, those that work on the traps and so on, they may be flown in all right.

Q. And they touch at one of the larger towns in Southeastern Alaska?

A. Well, nearest to the cannery so they can be dispatched in to the cannery where they are going to work.

Q. And with respect to the excessive use of alcohol, do you know whether the companies in Southeastern Alaska have the [27] same policy as you described about Bristol Bay?

(Testimony of Oscar Anderson.)

A. No. I will say this. I think our men are, as far as the nonresidents are concerned, are behaving very well.

Q. Most of the companies have the same policy against drunkenness as you have described about Bristol Bay?

A. Yes. If a man is going to work in a gang and he is drinking, naturally the gang will not stand for it and make a complaint to the superintendent.

The Court: What about when they are in port?

A. Well, they are not so very much in port. Of course, it is now and then, but pretty much with the nonresident they are a family man and they probably can't afford to blow in too much money for liquor.

Q. Would it ever come to your attention if a man is fined or imprisoned on account of drunkenness, we will say in port like on July 4th?

A. Well, there hasn't been much of that brought to my attention.

Q. Now, if a man were to be imprisoned and given a sentence, we will say, of ten days, causing him to lose time from his job, would such a situation come to your attention?

A. Oh, yes; yes.

Q. How or why?

A. The man would mostly be fired; if he doesn't show up on the job, why he is fired and that would be reported by the [28] delegate.

Q. To you?

A. Yes.

(Testimony of Oscar Anderson.)

The Court: Well, if there are any drunken fishermen around Ketchikan during the fishing season, they are not members of your union; is that correct?

A. Well, we have our percentage, too; I will say that. But really I don't believe our members are as bad as they used to be at one time.

Q. Do you know how taxes are paid by members of your union, nonresident members?

A. It is deducted by the companies from the man's earnings.

Q. Has the question ever come up as to whether these deductions should be made?

A. No, it has not. The boys consider it a service that the companies deduct it so they don't have to go to the trouble of applying for licenses and so on. The companies see to that.

Q. Do you know of a refusal by any cannery at any time to make the deductions for the fishermen from their pay, tax deductions?

A. No, never.

Q. Do you know of any refusals any place in Alaska at any time where the men have refused to permit the deductions from their pay for taxes by the canneries? [29]

A. No, I don't. The only thing was—

Q. Would such information come to your attention if the men would refuse to allow the deductions?

A. Yes. Last summer from one cannery I had

(Testimony of Oscar Anderson.)

a telegram asking whether the men should pay the fish license or refuse to have the company deduct it or whether they should allow the company to deduct it under protest, and I wired them back that they should allow the company to deduct the fish license until it was proven in court whether this law was valid.

Q. You didn't quite answer my question. Would it ordinarily come to your attention—

A. Yes, it would.

Q. If fishermen, either individually or as a group, in some cannery refused to permit the cannery to make deductions from their pay for taxes?

A. Yes; that would come to my attention.

Q. How is that?

A. The delegate would report it.

Q. The delegates make—how often do they make reports, and what requires them to make reports?

A. They keep a record of what goes on at the cannery, what concerns the union, and then they make their report in the fall when they come home.

Q. Do you know of any member of your union any place in [30] Alaska in the fishing—engaged in fishing, or trapmen or tendermen, who has become a public charge, a charge on the public?

A. I don't believe so.

Q. Well, would a fisherman, or do you have any provision in your union management for learning of such a thing if it did occur?

A. Yes; I would. I may state this, that we

(Testimony of Oscar Anderson.)

have had some isolated cases where a man became mental up there and had to be sent to the Morningside Hospital in Portland, Oregon. That is about the only thing I know of.

Q. Is there any method of reporting that the delegates are required to follow with regard to a man becoming sick or dying or becoming destitute?

A. He gets a report from the first aid station over there, from the medical journal there; they get the copy of all the cases handled at the station or hospital, and that is turned in to me at the end of the season.

Q. That takes care of sickness or injury?

A. Yes.

Q. I am talking about destitution now that would require a man to become a charge on the Territory. Is there any method which requires the delegate to report possible situations to you?

A. Yes; mostly reports of what takes place at the cannery [31] when a man gets sick or so and that he becomes a burden on the Territory; naturally that probably would be reported.

Q. Have there been any reports of destitution made concerning any resident members of your union?

A. Yes. We have several cases when there has been a request for financial aid and so on to help sick or destitute members up there.

Q. Concerning residents?

A. Amongst the residents; yes. We have a fund set aside for that purpose.

(Testimony of Oscar Anderson.)

Q. What do you call that fund?

A. We call it the Library Fund.

Q. The Library Fund. That Library Fund is made up from dividing money?

A. Yes; and fines imposed on the members for one thing or another; that goes to that fund.

Q. Do nonresident fishermen bring up any automobiles? A. No.

Q. Do you know if any of them own automobiles in Alaska? A. No.

Q. You don't know?

A. No. I don't think they would need them up here.

Q. Is it provided in your contract with the Salmon Industry, touching on fishermen, tendermen or trapmen, that the [32] employer has a right to inspection of baggage?

A. Yes; as provided for in our agreement.

Q. Do the companies ever exercise that right?

A. They have occasionally; yes.

Q. And for what cause?

A. Well, on the northbound trip they probably suspected that somebody was selling liquor, and they would demand to search the baggage, and on the southbound trip it would probably happen that the baggage was inspected with the possibility that some company tools or something was in the baggage.

Q. Stolen tools?

A. Also—

Q. Also what?

(Testimony of Oscar Anderson.)

A. Well, for illegal furs. Baggage have been inspected now and then to determine whether any illegal fur is taken out of the Territory.

Q. And what about small mesh nets?

A. Beg pardon?

Q. And what about small mesh nets?

A. Well, that has also been inspected to see if there was small mesh nets also.

Q. While you were delegate and since you have become Branch Agent and Secretary-Treasurer, have you ever had any experience with hearing of, from reports to you or seeing [33] disturbances of the peace, fighting, assault and battery among the nonresident fishermen? A. No.

Q. Or nonresident fishermen on one side?

A. No. There hasn't been much of that stuff going on.

Q. When is the last case?

A. Well, I have never had an experience as far as I am concerned at canneries where I have been.

Q. Do companies follow any policy with regard to fighting, assault and battery, things like that?

A. Well, they would discharge a man.

Q. Have you ever heard of a man being discharged for fighting? A. Yes.

Q. Resident or nonresident?

A. Well, there have been both nonresident and resident; but, of course, very isolated cases, I will say that.

Q. When was the last nonresident that you

(Testimony of Oscar Anderson.)

know of who was discharged for disturbing the peace or fighting or assault and battery?

A. Well, not that required to have the Marshal come to the cannery, but that happen sometime that has been a little fist fight and so on, and that is about all.

Q. Well, about how long ago did that occur?

A. I think that twenty-nine was the last time that I know of that. [34]

Q. Ordinarily would disturbances of that kind be reported to you?

A. Well, that happened in the bunkhouse and it was just at the end of the season and so they were ready to go home.

Q. Well, you saw it yourself then?

A. Yes.

Q. Ordinarily when fist fights and assault and battery and other disturbances like that occur at other canneries, would reports be made to you?

A. That would be made to the delegate naturally if he didn't see it. But otherwise I will say that there is very little of that; that is very isolated cases which is apt to happen anywhere.

Q. Which are better fishermen, residents or non-residents? A. Anchorage?

Q. I say, which are better fishermen, residents or nonresidents, in Bristol Bay?

A. Well, it seems that the nonresidents holds the edge all right.

Q. A little edge?

A. Yes.

(Testimony of Oscar Anderson.)

Q. Is the edge getting bigger or smaller?

A. Beg pardon?

Q. Is the edge getting bigger or smaller?

A. It is the nonresident seems to be a better fisherman. [35]

Q. My question was, is the difference between the resident and nonresident fishermen in the amount they catch getting wider or is it getting narrower as the years go by?

A. No; they are getting closer now.

Q. Closer and closer?

A. Yes. As a matter of fact we got some of the resident fishermen that is first-class fishermen, but then there are some poor ones that drag down the average, you know.

Q. What was the average? Can you name some averages, average catches at Bristol Bay for last year?

A. Last year was a very lean season, and I will say that I have the report that on Nushagak River there was only thirty-eight hundred average to a boat.

Q. Three thousand eight hundred fish average?

The Court: Is that fish or dollars?

Q. Fish. A. Yes; fish.

The Court: Well, but that is meaningless. You better explain it.

Q. At thirty-two cents apiece? A. Yes.

Q. The men share and share alike, two men on a boat? A. Yes; two men share alike.

(Testimony of Oscar Anderson.)

Q. That comes out to six hundred and eight dollars per man gross. Do you have any other average for other canneries? [36]

A. Yes, I have. Yes. The delegate gave a report of the averages at all the rivers.

Q. Do you have those with you?

A. No. I can just about give you roughly—it is supposed to be about seven thousand fish average on Kvichak River.

Q. The same price? A. Same price.

The Court: Now, wait a minute. This thirty-eight hundred, what section of Bristol Bay was that?

A. That would be Nushagak River.

The Court: Nushagak?

A. Yes. That is the second largest river there.

The Court: And for Kvichak, it was how much fish?

A. Seven thousand.

The Court: Well, how about the average over a number of years? I think that would be a better criterion.

A. Well, that is pretty hard to tell. Sometimes we have unusually good years and then not a very good year.

The Court: That is why it takes an average to make a criterion. Have you any figures, for instance, showing the average over not less than a ten-year period?

A. If you take it over an average of years, I

(Testimony of Oscar Anderson.)

would say that it should be in the neighborhood of something between fifteen and twenty thousand. That would be at least an average probably. [37]

The Court: Well, but what would the average be in money?

A. Oh, in money. Well, we have different fish prices. We negotiate a contract every year.

The Court: I realize that. That is why I asked for it in money; if you could give the average in money.

A. Well, if you take for the last ten years, we probably will say that twenty-five hundred dollars would be an average.

The Court: Is that the average per boat or the average per man?

A. Average per man. That includes run money and other extra earnings.

Q. That does not include the cost of transportation and board and room?

A. No. That is furnished free.

The Court: That is gross in other words?

A. Yes.

The Court: Well, what is the length of the season? Three weeks?

A. From the 25th of June to the 25th of July.

The Court: How long has it been that?

A. That has been, I think, since twenty-five when they set that regulation; 1925.

The Court: During this ten-year period that has been the season? [38]

(Testimony of Oscar Anderson.)

A. Oh, yes.

The Court: The 25th of June to the 25th of July?

A. Yes.

The Court: With two days off each week, is it?

A. Twenty-four hours closing period in the middle of the week, and thirty-six hours at the end of the week.

The Court: So it figures up about nineteen days then?

A. Yes—well, no. It averages up pretty much twenty-two and twenty-three days. Of course some of those days have not been full fishing days.

Q. Now that so many men are transported by airplane to Bristol Bay, can you tell us when they generally arrive?

A. About, if their agreement is consummated in time, they should arrive there about the 15th of June.

Q. That is for the nonresident fishermen and tendermen? A. Yes.

Q. When is there a substantial number of resident fishermen hired in Bristol Bay?

A. Well, they arrive just about the same time. However, you got resident fishermen living in the very district that they are put to work early in the spring to get the ways cleared up from ice and one thing and another ready to launch floating equipment.

Q. Early in the spring. You mean in April?

(Testimony of Oscar Anderson.)

A. Yes; when the weather starts to thaw.

Q. I believe you testified that the fall run work takes about ten days. That is loading the ships?

A. Yes, that is loading the ships; yes.

Q. Do the residents stay on working at any time after that?

A. Yes. They stay and take up the floating equipment and one thing and another, take it up on the ways.

Q. Now, with respect to Southeastern Alaska, are you able to state generally when the tendermen and trapmen from outside arrive in Southeastern Alaska?

A. Well, it all depends on the season there, too, when the season opens, but ordinarily they used to start to ship men in the middle of April.

Q. Well, it looks like our seasons are going to be opening about August 15th for several years.

A. Yes.

Q. Is your date of the middle of April still accurate?

A. No. Last year the bulk of the men were started, to ship them, about the first of May.

The Court: When was it you said the fishermen go to Bristol Bay or are sent up to Bristol Bay?

A. About the 15th of June.

The Court: The 15th of June.

A. Ten days before the opening there.

The Court: What do they do the ten days before the [40] opening of the season?

(Testimony of Oscar Anderson.)

A. They hang nets and get the nets ready.

The Court: Get the gear ready?

A. Yes. And also help unload the ships.

Q. Assuming that the fishing seasons will be closing in Southeastern Alaska somewhere around September 5th, as they appear to be for the past two years, when do the trapmen and tendermen leave Alaska?

A. As soon as they have the trap beached.

Q. Can you give us a date?

A. Well, just about, they should arrive in Seattle about the first of September, something like that, or latter part of August or something like that.

Q. My question was, assuming that our seasons will be closing for a few years, that we are now dealing with, about September 5th, when will the fishermen, when will the trapmen and tendermen leave—arrive in Seattle?

A. Well, I would say that, give a tender something about—it would be safe to say five or six days from Ketchikan to Seattle. Some make it faster of course; but it is just about that.

Q. How long does it take to beach the traps?

A. It all depends on how many traps a cannery has.

Q. You couldn't name a general figure then?

A. No, I couldn't, because the weather condition has a lot to [41] do with it, too.

Q. Well, would you say it takes maybe a week

(Testimony of Oscar Anderson.)

or two weeks for a cannery to clean up its gear and to get the traps beached?

A. Oh, yes, it takes that. It takes at least anyhow two weeks.

Q. Do resident trapmen and tendermen stay on and work after the nonresidents leave?

A. No; there is not so much of that. Of course there is odd jobs around the cannery, of course, if they want to work at that. No doubt there is work. There is always something to be done after the season.

Mr. Paul: I just want to check with the leadings, your Honor.

Q. Are there any reports made to your union with regard to the number of cases pending before the Alaska Industrial Board; that is the Board that handles workmen's compensation claims?

A. Yes. They come to my attention now and then.

Q. That is in connection with the injury reports that are made? A. Yes.

Q. Do you know how many cases there have been pending before the Industrial Board?

A. No; I couldn't exactly tell you. There don't seem to be many accidents in the fishing industry.

Q. It has been your experience that there are not very many accidents? A. No, not many.

Q. Are you talking about both resident and non-resident fishermen in Bristol Bay?

A. Well, if a resident does not get benefit ac-

(Testimony of Oscar Anderson.)

According to the act, why they mostly write to me and want me to take it up with the insurance company.

Q. I am talking about—you said there don't seem to be very many accidents in the fishing industry? A. No.

Q. You mean with respect to nonresident fishermen or all fishermen? A. All fishermen.

Q. Do you know of any members of your union—let's confine the question to nonresident fishermen members of your union—who have had to use the Commissioner of Labor in the collection of wages? A. No.

Q. Would those things ordinarily come to your attention if there were some trouble like that?

A. No, they seem to have paid up pretty well and, if there was anything of that, why it has been reported to me and I take it up with the industry.

Q. You just never have occasion to use him?

A. I never have. In my experience I have never had to use the Labor Commissioner.

Q. To collect wages? A. No.

Mr. Paul: I think that is all, your Honor.

Cross-Examination

By Mr. Dimond:

Q. Mr. Anderson, do any members of your union own property in the Territory of Alaska, homes or other property?

(Testimony of Oscar Anderson.)

A. Not that I know of. There could be in some single case that somebody had a piece of property.

Q. Most are up here temporarily?

A. Yes.

Q. And have their homes in the States?

A. Yes.

Q. What do the members of your union who fish in Bristol Bay do after they return to Seattle?

A. Fish along the coast, various fishing.

Q. How long do they fish? All year, would you say?

A. No. Some take in fall fishing in Puget Sound. When that is done, they go to California sardine fishing. This last year several took to shark fishing, too.

Q. How do the canneries determine which fishermen come up to Bristol Bay each year? Do they pick the best men? [44]

A. The superintendents want to see the fish records, what kind of fishermen they are.

Q. Therefore, they pick the men with the best records?

A. The highest fishermen.

The Court: You mean the superintendent of each cannery?

A. Yes.

The Court: What do the other superintendents think of that? Don't they get a whack at it?

A. Yes; the superintendent for each cannery. When there are applicants, they inquire about their fishing records.

The Court: I thought they were all employed

(Testimony of Oscar Anderson.)

through the Salmon Industry. You don't mean to say that the superintendent of each cannery employs his own fishermen?

A. Yes.

The Court: How? What is the mechanics?

A. They go up and apply for it. They have to clear the union before they leave, but we haven't got the hiring hall.

The Court: You mean they can be a nonmember when they go to apply?

A. A nonmember naturally can inquire about the job and, if he has a job, however, they have to clear through our organization.

The Court: Clear for what purpose? For joining?

A. Joining. [45]

The Court: How do they find out their record if they are not members or haven't worked there before?

A. We have records to prove if they are a member.

The Court: How would he find out who were good fishermen if someone was not a member of your union and hadn't been there before?

A. In that case he would take a chance, inquire what other experience he got in the fishing industry, and he also probably was a man that has had a boat. The company assigns a boat to one man called the captain, and he may select a partner, too, and take him to the superintendent and say, "This

(Testimony of Oscar Anderson.)

is the man I would like to take with me this year."

Q. Mr. Anderson, you have testified, I believe, that the operators in Bristol Bay under a contract with the union pay the transportation of the men from Seattle to Bristol Bay? A. Yes.

Q. Have there been any cases where a nonresident fisherman belonging to your union has been in Alaska or wants to go to Anchorage after he finishes the season? Is he transported there or does he go to Seattle?

A. There may be reasons why a man for one reason or another had to go to Alaska or after the season was over in the States went to Alaska to work, particularly in the war years on defense projects, and then when the season opened [46] would go into the Bay.

Q. On his own?

A. No. We pay a man working in Alaska then. We pay the cost of transportation from the place that he is living wherever it may be. However, he cannot exceed the cost of a nonresident man from Seattle to Bristol Bay.

Q. How many nonresident fishermen members of your union apply for work in Bristol Bay each year who are here and would like to go up there?

A. Very few.

Q. Quite a few? A. Very few of that.

Q. You don't have very many fishermen who live in the States—

A. Come up here and then go into the Bay?

(Testimony of Oscar Anderson.)

Q. Yes. A. That would be very few.

Q. How many fishermen are in the Bay each year?

A. An ordinary season we—well, of course now that depends considerably on the regulation, how many boats the Fish & Wildlife think should be fishing in the Bay. Take a year like this, is a very sharp curtailment going to be, and I would say about one-third, or this coming season in Bristol Bay—

Q. I am not considering this but the past years. What is the average number of fishermen in Bristol Bay? [47]

A. I would say possibly sixteen hundred fishermen on the average.

Q. Would you say about half of those are non-resident fishermen? A. Yes.

Q. And the other half are residents?

A. Yes. It is probably fifty-fifty. Nushagak River has more residents than nonresidents.

Q. Did you testify that the baggage of your members is searched each year before coming to Alaska? A. Occasionally.

Q. And searched again before leaving for the States?

A. It used to be searched on the steamer going north.

Q. Have there been any cases of discovering illegal furs in the baggage of fishermen?

A. No. They are pretty good that way. No fur is being taken out. Too risky, I guess.

(Testimony of Oscar Anderson.)

Q. Mr. Anderson, I believe you testified, did you not, that some of the members of your union stopped at Yakutat on their way north to fish?

A. Yes.

Mr. Paul: I think that testimony was stricken, your Honor, and objection was sustained to that line.

The Court: Yes, I think I did sustain an objection to it other than to allow him to state that they stopped at [48] Yakutat at times. What is your question?

Mr. Williams: I was going to interpose, your Honor. I don't believe I objected to the question of them stopping at Yakutat. I think the court made some comment at that time as I recall the record. The record now shows that these men do stop at Yakutat sometimes. I think that is in the record.

The Court: The only thing I cut out, until, as I ruled, the development during the hearing might make it pertinent, are the causes of their stopping there and the details and the duration.

Q. Mr. Anderson, do the tender crews coming to Southeastern Alaska stop at the various towns as they come up to go fishing?

A. Yes. They call in at Ketchikan always when they come up.

Q. What other places do they call at?

A. What?

(Testimony of Oscar Anderson.)

Q. Do they call in at any other towns besides Ketchikan?

A. Yes. It all depends on where they are bound for. They may call in at Hoonah possibly, and it all depends on if there is anything they have to call in for, possibly engine trouble or one thing and another.

Mr. Dimond: I have nothing further.

Mr. Paul: Nothing further, your Honor.

The Court: Well, what about the—what do these tendermen and trapmen earn as an average during a fishing [49] season?

A. Just about fifteen hundred dollars; that is in Southeastern Alaska. To Kodiak and the Westward District and Cook Inlet they are on case percentage and that varies. Sometimes, well, I would say they probably will make two thousand dollars in a season if it is a good season. However, we have a provision in the agreement that if that wages does not come up to the Southeastern scale why then they will be paid according to the Southeastern agreement.

The Court: Well, it wouldn't be incorrect then to say that the average is, or that the pay averages, between fifteen hundred and two thousand dollars?

A. That would be pretty well, yes.

The Court: That is all.

A. Of course that is a longer season than in Bristol Bay.

(Testimony of Osear Anderson.)

Redirect Examination

By Mr. Paul:

Q. Oh, say. I neglected on direct examination to ask you about Cook Inlet. If counsel has no objection I would like to make the same comparison I made before. With respect to your testimony about the arrival, departure, method of fishing, facilities furnished by canneries, that you have described about Bristol Bay, are the Industry practices and customs the same in Cook Inlet or different? [50] A. What is that?

Q. Is Cook Inlet fishing any different than Bristol Bay fishing?

A. Yes. In Cook Inlet you have traps, of course, some traps, and then you have hand traps.

Q. My question is confined to gill netting. Is that different?

A. They have set nets there, too, and now this later years and perhaps more so last year they started to drift in Cook Inlet. They never did drift gill net fishing in Cook Inlet before.

Q. Are there any nonresident fishermen your union has in Cook Inlet?

A. No. There is no nonresident fishing with gill nets in Cook Inlet.

Q. It is all resident fishing there?

A. Yes; and it is independent boats.

Q. What about Prince William Sound? Does your union have any members there?

(Testimony of Oscar Anderson.)

A. No. We have no members there. They have their Cordova Fisheries Union that have jurisdiction there.

Q. Cordova Fishermen's Union. Who issued the charter to them?

A. The International Fishermen and Allied Workers.

Q. That is what we call I.F.A.W.A.?

A. Yes. [51]

Q. The International Fishermen and Allied Workers of America? A. Yes.

Q. Who issued the charter to your union?

A. We have it from the International, too.

Q. I.F.A.W.A.—the same organization?

A. Yes.

Q. Do you know if there are any nonresident fishermen in Prince William Sound?

A. Yes. Just about half of them are nonresidents.

Q. And do the fishermen in Prince William Sound sell on the open market or to special companies?

A. No. They sell pretty much to special companies there, and it is independent gear. More than half is independent gear.

Q. Do the nonresidents have independent gear?

A. Yes.

Q. And also company gear?

A. And some company gear; yes.

Q. Well, now, do the employers ship in nonresident fishermen to Prince William Sound in much the same way as they do in Bristol Bay?

(Testimony of Oscar Anderson.)

A. No. The independent fishermen pay their own fare.

Q. No. I mean the ones who have company gear.

A. Well, the company gear—no. They pay their own way in, too, I understand. [52]

Q. In a sense all the non-resident fishermen are independent in Prince William Sound except that some of them go and get company gear?

A. Well, the majority of them are independent fishermen, but there is some that use company gear although it is a small percentage.

Mr. Paul: That is all.

Recross-Examination

By Mr. Dimond:

Q. I don't think I understand you. Did you say that there were no nonresidents in Cook Inlet or that there are?

A. Not of the gill net fishermen; they are all resident fishermen.

Q. They are all residents? A. Yes.

Q. Do you have any of your members in Cook Inlet at all? A. Yes.

Q. What kind of fishing do they engage in?

A. We have got salmon fishing and we have got—

Q. Well, outside of gill netting? You said there were no gill netters that belong to your union that

(Testimony of Oscar Anderson.)

are non-residents. What kind of fishing do they engage in then?

A. Well, we got traps there; trap and tendermen.

Q. Trap watchmen and tendermen? [53]

A. Yes.

Q. Are they all non-residents?

A. They are mostly, the biggest per cent of them are non-resident, trap and tendermen, but the gill net fishermen there are resident fishermen.

Mr. Dimond: That is all.

Mr. Paul: That is all. Plaintiff, rests, your Honor.

(Whereupon court recessed until 2:00 o'clock p.m., March 16, 1950, reconvening as per recess, with all parties present as heretofore; whereupon the hearing proceeded as follows:)

DEFENDANT'S CASE

THOMAS PARKE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination

By Mr. Dimond:

Q. Will you state your name?

A. Thomas Parke.

Q. Where do you reside?

A. Juneau.

(Testimony of Thomas Parke.)

Q. What is your occupation?

A. Special Deputy Enforcement Officer for the Department of Taxation.

Q. How long have you been engaged in this occupation?

A. Since 1946; a month after the department was originated. [54]

Q. Have you also been a fisherman?

A. No. I have never done commercial fishing.

Q. Will you explain in general your duties as Special Deputy Enforcement Officer of the Department of Taxation?

A. My duties are enforcement of the Territorial taxes and licenses and especially the fishermen's licenses.

Q. What do your duties with regard to fishermen's licenses consist of?

A. Well, the enforcement of the license tax which consists of supplying applications and seeing that the licenses are issued and the enforcement to see that the fishermen have licenses.

Q. What is the procedure in general for the collection of fishermen's licenses as it applies to both resident and nonresident fishermen?

A. Well, it is practically the same procedure as far as buying licenses, purchasing as far as the fishermen is concerned, but the enforcement is considerably different between resident and non-resident fishermen.

Q. Do you have agents located in any other ports of Alaska?

(Testimony of Thomas Parke.)

A. Yes, we do. We have agents in practically all fishing ports and fishing villages to make it possible for fishermen to receive licenses most any place, and we also have applications at practically any place we can leave them where they can easily secure a license—an application and [55] send in for a license.

Q. Do you have applications at the various canneries?

A. Yes. They have them at the canneries and all fish-buying seows.

Q. In your experience as a collection officer, enforcement officer, with regard to fishermen's licenses, have you run across any particular problem in the enforcement and collection of fishermen's license taxes with regard to resident trollers?

A. No. The resident trollers are a very simple matter, collecting licenses from them, because they are nearly all willing to pay. I should say ninety-nine per cent willing to pay. And as far as the enforcement end of it is concerned why, if they should happen to slip by during the season, you have got a chance of picking up the backward ones at their homes in the fall.

Q. When do most of them pay? Before they go fishing?

A. Before they go fishing; yes. In most of the Southeastern towns where most of the trolling is done, I am invited to their union meetings to be there a certain time when the meeting is over to

(Testimony of Thomas Parké.)

issue licenses, and the men are notified ahead that I will be there to issue them, and it saves them the bother, or if I am down in the harbor in the evenings—I have my own boat there and I am working on it in the evenings in the spring—why I set up an office there, [56] and the licenses are sold, and they come around looking for me. Right at this time why, if there were any that had missed it from last year from out of town or some place, they would be in to see me about it.

Q. Is the enforcement or collection of this license tax from non-resident trollers any different than with resident trollers? A. Yes, it is.

Q. It is different?

A. It is much more difficult due to the fact that they are here during the peak of the season and then they are gone, and if they are gone they are done for, and they come up here with the idea of nothing but making a profit, just the same as yourself if you were to go down to Washington.

Mr. Paul: I think, your Honor, he ought to demonstrate some familiarity with what is going on in their minds. It can't be established by a tax collector very well. I don't think he is qualified.

The Court: As I understand it, it is not a case of mental process. It is just the inference that you derive from someone coming up here fishing and leaving. That is not an unreasonable inference, but, of course, the inference perhaps, more properly speaking, belongs to the court rather than the witness.

(Testimony of Thomas Parke.)

Q. Will you explain to the Court then why there is a different [57] enforcement problem with non-resident trollers than with residents; what is the distinction between the residents and non-residents that makes an additional problem for you?

A. Well, as far as instances of evading it or would you want—

Q. Yes.

A. Well, we could state several instances where they have evaded. The big point with them all is to evade everything they possibly can up here. They bring up their supplies at the first of the season, practically everything they need, staples and gear, and are ready to go fishing, and there is no reason to come to a licensing town where we could check them, so it is a case of having to check them on the grounds. That means going out with a small boat or maybe in years to come it may be an airplane. You have to get in where they anchor in the evening, like, I will say, for instance Hoctaheen. In 1947, the first of July, I was anchored in that bay that evening checking boats. What I usually do is go into the bay fairly early in the evening before they start in and then check the boats as they come into the bay. And along about eight o'clock in the evening or so why one of the local boys came over who was equipped with a radio receiver and transmitter, and he heard a group of Bellingham boats that were out. If you are familiar with Hoctaheen, it is out on the ocean side of Yakobi Island

(Testimony of Thomas Parke.)

or the other side of Chichagof Island, [58] and these fellows talked back and forth. They have a code. At that time why "beans" was their code for locations, and they used "string beans," "backed beans," "pork and beans," and they meant different places, and the local boys had broken down part of their code, and this fellow had learned that they knew I was in the harbor so they agreed to fish until dark and go into a little bay about approximately two miles below Hoctaheen and anchor, and they were going in just at dark and with the understanding that I couldn't get in after dark, knowing I didn't know my way in through the rocks, and there was pretty good breakers that evening, and so I waited around until midnight and then took the skiff and outboard and went down and went into the bay, and sure enough there was seven Bellingham boats in there and one with nine men aboard, and there wasn't a license on any of them. They definitely evaded the tax as long as they could.

Q. Have you found it necessary to go out to the fishing areas to contact these non-resident boats?

A. Yes, it is necessary to go out. And you follow—the ordinary procedure is to follow the fish. At the time I had my boat rigged with a two-way radio. Before this I had to go by other fishermen that had radios reporting where the fish are. As soon as somebody catches fish why all the boats head for there. The non-residents, I should say.

(Testimony of Thomas Parke.)

The residents will, if they are fishing, if they are around Juneau for instance, why, and if there is a run up at Deer Harbor, why they will think twice before they will leave home to go out there for maybe a few days. But non-residents will take that off. They have no ties. Any district, they will take off and go there, and I make it a point to be there too. It is a case of the way the setup is and the amount of money that is appropriated for enforcement, why you have to spread pretty thin, so you have to keep on the move and create a hazard wherever you can, and we pick them up right along.

Q. Mr. Parke, have you ever compared the different types of boats; that is, between residents and non-residents?

A. Yes. Another thing, the non-resident fisherman's is far superior to the resident's due to the fact that the only boats that come up here are the first class ones and in good shape and pretty big boats, and they are all—you or I or nobody else would start out from Seattle with a hand-me-down motor—so therefore they are in first class shape when they come up here, and the minute they get here they can drop their lines in and go fishing. We have that type of boats here too, a few of them, but our average of boats is way down low because we have a lot of poor fishermen, as you know, that don't dare go over twenty miles from home, far enough that they can row back if they have to, [60] and therefore when they get out fishing why it is the bigger

(Testimony of Thomas Parke.)

and better boats that make the go of it, and when the weather gets rough why they are big enough and capable of taking it for hours out there when the little fellow and the average local fellow has to go into the harbor and anchor.

Q. Does the non-resident troller fish a different area from the resident troller, or the same area?

A. No. He will fish pretty much in the same area. It will depend on where the fish are. He will be where the fish are, while the resident troller—there are lots of men here in town that you all know that don't go over twenty miles from home here. Their equipment doesn't allow them to go and family ties and so on, so they would stay in fairly close, and they can't—therefore, the amount, the bulk of the fish would be up to the non-resident trollers.

Q. Do you have any way from a distance of distinguishing between resident and non-resident trolling boats?

A. Yes, we have—not necessarily the boats, but the licenses; we have. Ordinarily the boat has its home port hailing on it. But we have the license plates which we put in effect two years ago merely for enforcement which is a metal plate of different colors for residents and non-residents, and we require them to post them, this last year, on the star-board side of the boat, and you can tell from a [61] distance with binoculars whether he has a bright red one on or a green one which is a resident or non-resident.

(Testimony of Thomas Parke.)

Q. Do you know why that procedure was introduced?

A. Yes. We put that procedure in merely because the fish buyer would say, "Yes, this man is licensed. I saw his license." Well, the fellow would have a resident license, and I would be the only one, or somebody from the Department, that could check whether he was a resident or non-resident, and the boys right among him wouldn't know what kind of license he had. He wouldn't show it. While when you have the plate, he also has the license; but the plate is extra, and he has to post that plate on his boat and, if he posts a resident plate when he is a non-resident, why we usually get a supply of telegrams and so on right away from other boys who tell us about it, and we can run him down.

Q. Do resident boats spot the non-residents?

A. Yes. The residents report it right away. We have instances, several of them, like that. One for instance in Petersburg where local boys there reported three boats that had purchased resident licenses in Ketchikan, and they reported to the agent in Petersburg, and he reported it to me, and they were going to try to keep track of where they were and lost track of them, and the next report was from a resident fisherman at Tyee at Murder Cove, and that wired me here at Juneau on the radio down in the harbor [62] and told me that these three boats were there. Well, the wire went out on the same band as they were receiving on, and among them,

(Testimony of Thomas Parke.)

which the other fellows heard, they said, "Well, we are hot boats. Something has got to be done." So two of them left immediately. I left that same—I got it in the morning and I left that afternoon, and I got down there. The three of them were missing. I found out later that one had gone across to Gut Bay. It is across on the Baranof side. It is a little hole in the wall—and anchored, and the other two had left and gone to Sitka. These two went into Sitka and bought additional non-resident licenses, and so the outcome of it was they had two licenses all year, and the other fellow stayed low until I passed and went on down to the west coast of Prince of Wales. On the way back I surprised them there and I got this fellow. He practically gave himself up and come in and admitted he was wrong and he left twenty-five dollars with the cannery superintendent there for an extra license.

Q. Do you recall, Mr. Parke, any instance of collecting taxes from non-resident licenses in Kalinin Bay in June, 1948?

A. Yes. I was in there one night checking licenses. As the boats come in, it is kind of a little bottleneck getting in that bay, if you are acquainted with it, and I checked them as they come in, and our boat was down pretty far in [63] in the bay, and there was between eighty and ninety boats in there that evening, and three non-resident boats come in and pulled in, and you can usually tell who are friends there. One fellow anchors, and the others

(Testimony of Thomas Parke.)

tie to him, and there will be two or three boats there together, so I boarded these three boats, and they were all non-residents, and I asked them about licenses. Well, no, they didn't have them and kind of made a joke out of it. I said, "What do you think about the deal? Why haven't you?" "Well, we didn't think you would catch us and we figured we would duck you. If we had known you were in the bay, we would have gone some place else. Gosh, this is just about your time by here. Why if we missed it tonight, we probably would have missed you for good," and so on. So I said, "What do you think you should do about it?" "Well, I guess we will have to buy licenses." Well, it was handy to Sitka and a good location, so we sent them to Sitka and warned Sitka. They all plead guilty and received a fine of fifty dollars apiece out of it and got licenses, but if I hadn't gotten them and they had been in control where they would have known I was there, why we would never have seen them at all.

Q. How do these non-resident trollers keep track of you?

A. Ordinarily by radio control. It has gotten to be in the last few years, why the industry has modernized with [64] everything else, and they can keep ahead of me and practically tell every move that I make all summer long. I have lots of friends on the other hand that keep me posted too.

Q. Do you recall any similar instance in Craig in August of 1948?

(Testimony of Thomas Parke.)

A. Yes. There was another instance there. I was tied at the city float, if you are acquainted in the town of Craig, why the city float and the Union Oil, or the Standard Oil floats are about two hundred feet apart. I mean you have to go a couple blocks to get around from one to the other. I was on my boat, and I just come out of the pilothouse and I noticed several boats taking on gas, oh, seiners and everything else, and naturally I looked for plates on every boat that showed up. I noticed these four boats with no plates on them. I got binoculars and examined them, and nothing showed, and so I went up on the dock and I went around and, when they tied up for gas, I expected to check them and see them. They can come up right to the face of the dock practically, and by that time one of them spotted my boat, and they talked back and forth. He backed up and two of them tied together, got up where they could talk back and forth a little bit, and then turned around and pulled out of the harbor and left and headed south, and this was along in the latter part of the season, [65] and they were on their way south. So I had a little business I was taking care of in town; and it took me about twenty minutes to finish up. By the time I got started they had a half-hour start on me. I went from there to Waterfall, and by the time I got there the oil station attendant there told me, he said, "There were some boats not looking for you here." He said, "There were four boats filled up with gas,

(Testimony of Thomas Parke.)

and had filled with gas and said they were being chased, to hurry up. They wanted to get out of the Territory, and they were on their way south, and they gassed there instead of Craig and took right on." And they were only about five hours from the border, and I checked at Hydaburg, and they hadn't appeared there at all, so apparently they went outside the island there at Hydaburg and took right on across the gulf. That evening they probably anchored in at the mouth and took off at daylight in the morning for Dixon Entrance. That is four more that is a thing of the past.

Q. Mr. Parke, have there been any instances where non-resident fishermen have bought resident licenses?

A. Yes; that happens right along. In fact we have about thirty-one names right now that we are investigating now because they have been reported fishing with resident licenses when they are non-residents, when they purchased them. [66]

Q. Based on your experience, as you related just now, in collecting taxes from non-resident fishermen, do you believe that there is any other way of collecting the tax, enforcing the tax against non-residents, instead of going out in the area itself?

A. It is about the only way under the set-up of the laws and so on, why you can't leave it to them to send in. It is abused so much, and the only way is to go out on the grounds and see. After all they don't have to clear customs when they come up here.

(Testimony of Thomas Parke.)

Q. Would that procedure be necessary for resident trollers?

A. Why, no. I could check every troller that trolled here last winter by going to every little town in a matter of two weeks here in Southeastern, and I could check every troller in the country.

Q. Is there any—leaving the trollers for a moment—is there any particular problem in the enforcement and collection of the tax on resident gill netters outside of Bristol Bay?

A. No. That doesn't amount to—it is not much of an industry otherwise, not much of a phase of fishing, I should say. Ordinarily, like the Taku which has quit money making in so long, that it ordinarily consists of resident boys from the local towns. There is Haines, and the boys come down here and come in and buy their licenses right off. I usually go up there to check on the gear licenses and so on, and everybody knows the other fellow there, and they take care of it, and the same way at Yakutat among the native fishermen who fish the Situk and Akwe and those rivers.

Q. Is there any particular problem with non-resident gill-netters outside of Bristol Bay?

A. Well, you do; yes. You will have them coming in. But what ordinarily happens is a non-resident will come in and he may be a fisherman at heart or may be a bass fisherman and, if there has been any in Juneau here this last summer when the run happened to be heavy at Taku, why he would

(Testimony of Thomas Parke.)

have been right out there fishing and grab the peak of the fishing, and it is a short season, and in a matter of a week or two why the season would be over and he would be out of it and be gone, and you just can't keep up, and you have other areas where, oh, around Dangerous River and Italio and Situck, Ahinklin and up in the Alsek River you have the flying fish out of there the last few years, and a new phase of it, they work their equipment way up the rivers and then fly their fish out, and you have one or two operators with a plane flying the fish out, and you will have a few good fishermen.

Q. Well, do those men pay their license tax?

A. No. You have to go in after them and which is a considerable [68] expense, and about the only way to get in there is to fly in and check. You don't know who is there until you do go to the expense of going in after them.

Q. Is there any particular problem with non-resident gill-net operators in the Cook Inlet area?

A. Yes; the same way. The licenses are abused up there, and considerable, lots of them are giving, oh, Anchorage, Palmer and Homer as their addresses. Lots of the construction workers up around Anchorage are out and they just consider themselves a resident and buy licenses and fish there, and when the season is over they are gone, and there is no record of who they are or where they come from at all. You start looking back on some of those records in some of the towns they come from and inquire

(Testimony of Thomas Parke.)

about them, and they never heard about them at all.

Q. How are the licenses collected from both resident and non-resident gill-netters in Bristol Bay?

A. Most of that is taken care of through the canneries. It is in their contract. Practically all the fishermen there are contract fishermen that sign up with the cannery and use the cannery gear, and it is usually deducted ordinarily from their pay.

Q. Well, do the canneries remit to you that money for the licenses?

A. Yes. It is held there. The precedent was started years [69] before we were ever in existence of going through the cannery and collecting, and we find that that is the only logical way of doing it.

Q. Why do you have to go to the cannery instead of letting the cannery send the money in?

A. Well, it just gets abused so much that just in getting it by far pays the expense of going in there to get what is not sent in.

Q. Will you explain why, if you know why?

A. Well, yes. Where fishermen that are just there part time and some of them will quit and go out and so on, and there are a few instances where there is quite a little—where the season is shortened, where the Fish & Wildlife curtailed the season. Therefore, in order to cut down why instead of cutting down the dates they cut off the amount of gear, and that means the poorest man quits fishing. It is known and, I believe, agreed among the unions in the contract with the cannery that, if there is to

(Testimony of Thomas Parke.)

be any curtailment, why then the poorest fisherman is laid off first. Therefore, naturally they keep the best fishermen they could. So maybe the Fish & Wildlife will lay off so much gear, and that means that so many boats have to be laid off at each cannery. One cannery will have to lay off three and another one four and maybe another one eight boats. This is in the middle of the season and, if we are not right there, why they lay off eight boats and send sixteen men home, and when I come to get the applications why if they were left to be sent in, why those would be just omitted.

Q. They don't deduct from everyone?

A. They just won't deduct; they just turn it back. Where it goes, whether the fishermen gets it back, or not, I don't know. But we do know what we have to do in that case is go in and check on how many boats they started fishing with in the season and, if they have curtailed, we can find that out before we go in the area. Ordinarily we can pick up on the dock how many boats they have tied up and, if they tied up four boats, that means there are eight more fishermen. At a glance I can tell how many boats they have got now. I can check on how many are fishing at the time and how many are tied up, and it pays by far to go after them.

Q. Now; these men who are laid off and sent home, as you say, are they both resident and non-resident fishermen?

A. I believe they are from both classes. I

(Testimony of Thomas Parke.)

couldn't say for sure whether they lay off evenly in both or not, but I do know of non-residents that were curtailed.

Q. Regarding the resident fishermen that might be laid off, do you then miss the collection of their license tax along with the non-residents? [71]

A. Well, no. Ordinarily that comes up—ordinarily the resident will want his license anyway, the ones up there, the big share of the natives and, say, residents of the watershed. You see in order to have a stake-net on the shore they must live in the watershed for three years. Therefore, most of them do a little fall fishing, too. There are a few mild-cure plants and so on where they buy, and they require the license, and then the residents that go into the bay to fish, fish the boats, are ordinarily fishermen that they will either fish seines down here before, or trollers, or naturally fishermen at heart, and they will want their license for other deals, and lots of them have their licenses before they ever go up there at all, either buy their license here, either for fishing or have it ready for fishing.

Q. Now, did the Department of Taxation collect licenses for all the fishermen in Bristol Bay for 1949?

A. No; it didn't. We have still approximately one hundred and twenty that are still pending during, I should say, a compromise. They refused to pay. That was among the tendermen and of the, well the tender, what would be tender crews on the boats that bring in the fish. They had considerable

(Testimony of Thomas Parke.)

trouble the whole way through up there this year on that, and the fishermen had agreed to pay under protest, but the tendermen refused to, and we ended up, what it turned out to be was going to be a case of tying up the industry. We tried to arrest, pick out one fellow at Dillingham, and what we would have had was everyone was going to quit right then. The pack was ready to go out, and the steamer was out in front ready to take it, and so what we ended up doing was accepting a guarantee from the cannery with the signature for all the men and the cannery would guarantee to hold this money until it was settled in court.

Q. You don't have the money yet?

A. No; we don't have the money, but we do have a guarantee from the cannery if the case goes through.

Q. Are trap watchmen residents and non-residents?

A. Yes, they are. I would say the majority would be nonresidents.

Q. Have you had any particular difficulty in the enforcement of the license tax law against the resident trap watchmen?

A. No, we don't. Ordinarily the fellows that either troll or something else the first of the season pay up, and that is all. They are willing to pay it.

Q. How about the non-resident trapmen?

A. Well, you have quite a problem there again.

Q. Will you explain what that is?

A. Well, ordinarily throughout Southeastern

(Testimony of Thomas Parke.)

Alaska, I believe all over, there is an agreement with the canneries that [73] the canneries will pay for the man's trap license—for the trap watchman's fisherman's license—and well, what happens in that case is they just don't report on the traps. It may be that "X" cannery out here has eight traps. Well, we go around to collect from them, from the cannery, and there will be, well—it depends. Some of them have one and some have two watchmen on it. Maybe they will pay all right for them. But maybe John Jones, who owns a private trap which is under contract to the cannery and which the cannery supplies and it takes the fish out of it, well, he won't have a license and, if you are not right out there to check on how many traps they are brailing, well, we will miss out on probably two more licenses on each of those cases.

Q. Do you recall any instance particularly regarding the enforcement procedure against non-resident trap watchmen in Chatham Straits in August, 1948?

A. Yes. We have a deal there, similar to that where one of the canneries had all the applications made up and settled for, and I talked to the—oh, the tally men ordinarily come up and have been at the job long enough to know where to start looking for that, and ordinarily you go up on the dock and kind of talk to everybody you see along there about the weather and so on and how many traps you have and how many fish are coming out of this one

(Testimony of Thomas Parke.)

and that one, [74] and the outcome of it is you get a pretty good picture before you ever get to the office. In this case why there was nineteen trap watchmen licensed and tendermen and so on, and then when, by the time I got to checking over we got the score up to twenty-eight. Twenty-eight, it should have been, and nineteen were turned in.

Q. Were those additional men residents or non-residents?

A. Non-residents all the way through.

Q. Now, Mr. Parke—

A. I might add that in Bristol Bay in the collection up there among the scowmen and tendermen all the residents are, except one—there was one that would have been except his name came in late and they withheld five dollars for him—but outside of that all the resident tendermen are all licensed. They bought licenses. They were all right. They wouldn't squawk at all. They wouldn't put up any argument. They paid it. But the non-residents are all contesting it.

Q. Mr. Parke, going back to Bristol Bay for a moment, do you know whether the average resident and non-resident fishermen, which is higher in Bristol Bay? A. Non-resident.

Mr. Paul: I don't believe the witness ought to be allowed to answer that, your Honor. There is no testimony that he made any investigation at all of averages. [75]

Mr. Dimond: He goes in Bristol Bay every year

(Testimony of Thomas Parke.)

and around the canneries and sees the tally sheets.

Mr. Paul: Let him say so first.

The Court: If he says he knows, he can testify, and you can cross-examine on the source of knowledge. He doesn't have to first disclose all his sources of knowledge. If he knows, he may answer.

A. What was the question again?

Q. Do you know whether the resident or non-resident average is higher at Bristol Bay regarding catching fish?

A. The catch of fish from what I have learned to believe and from looking on their score boards, it would be the non-resident that would be highest. You kind of watch those as you go along, and that is common talk throughout the bay, and you will have boat number so and so and so and so high and have residents on one side and non-residents on the other, and as a whole the non-resident turned out there.

Q. Going now to the business of seining, do you have any particular enforcement problem with resident seiners in Alaska?

A. No, not to amount to anything. They are just practically the same as all the other fishermen. They are local boys, and we know who has fished and who hasn't fished and, if they try to sneak by, why you know right where to put your finger on them and, if they happen to sneak out of port [76] without a license, you know where to get them when they come back.

(Testimony of Thomas Parke.)

Q. Is there any particular enforcement problem with non-resident seiners?

A. Well, yes; the same as some of the rest of them. They are up here with the one intention of making money and getting out and, if they can get out without a license, it is to their advantage, and—

Q. Do they contract with the canneries to sell?

A. Part of them do in some areas and—I should say in all areas part of them do. There are so many free-lance boats that sell here and there that don't tie with any. That is more general among the non-resident than the residents. Most of the residents are fellows that are broke right now and they have to tie up with a machine shop or cannery or somebody to finance them to get started.

Q. How do you find out whether or not a non-resident seiner has purchased a license?

A. They use the plate system in Southeastern Alaska, the same as—

Q. I mean where have you seen them to find out? On the grounds?

A. Ordinarily I have to check them on the grounds.

Q. While they are fishing?

A. Well, that is quite a problem, of trying to catch a seiner [77] due to the fact that he is either stopped watching a school of fish or trying to purse them, or else he is running, which is usually about the size of it. And in Southeastern we have it pretty well controlled by using plates. If there are six

(Testimony of Thomas Parke.)

men on the boat and you see six plates, why you can sneak off and not bother them at all. But in other areas it is a considerable problem. We would have to have boats in Prince William Sound and Cook Inlet and around Kodiak, and that would have to be considerably more boats than we could afford to put on for the job.

Q. Do you stop the seiner while he is pursuing or watching for fish?

A. No. You don't dare to do it because you could scare away a thousand fish there, and maybe he is completely in the right.

Q. Then if you want to board his boat and check his license, where would you stop?

A. The only place to catch him would be at a marine station or a cannery or a fish-buying scow. Take these fellows who jump around, why it is an awful problem to try to keep up with them.

The Court: You mean that they might have a license even though they have no plate?

A. In the northern area. The plates are only used in Southeastern Alaska. It is really for enforcement, and it has [78] been a problem to try to build up to the place where we could enforce it even if they have plates on so we could check.

Q. Is there any difference in the enforcement procedure in northern Alaska for seine boats as compared with Southeastern Alaska?

A. Well, yes. That is, where it would amount to—down here we have a chance of running around

(Testimony of Thomas Parke.)

with the boat and checking them on the grounds, and you can find if there is a run, and once in a while at Anan Bay they would all be there and get their fish there instead of if they were contracted with, say, the Hoonah cannery, and those boys would have to make arrangements to go down there, and they would have their buyer there to pick up the fish, while the free-lance non-resident has no ties with any cannery or any company up here and he loads up with fish and he sells to the first fellow on the grounds and goes after more fish and sells to somebody else the next time that would show up to take them.

Q. Have you formed an opinion as to whether or not it would be necessary to go out in the fishing areas and check for licenses if only resident fishermen were engaged in fishing in Alaska?

A. Yes. That would be fairly easy to do.

Q. Would it be necessary to go through this enforcement procedure? [79]

A. No, it wouldn't. It might be a case of giving them a good checking down here on the dock once in a while. As it is, we have agents set up in each of these little towns. You take our agent at Craig; he knows every fisherman in town, and when they go out in the spring if they sneak out, why they have to come back in the fall, their family is there, and they would pick up their license then, and there would be no reason for it.

Q. Have you formed an opinion as to whether

(Testimony of Thomas Parke.)

it is more difficult to enforce this license tax against non-resident fishermen as compared with resident fishermen?

A. By far; yes. At least ninety per cent of the work would be with the non-resident.

Mr. Dimond: That is all.

Cross-Examination

By Mr. Paul:

Q. Mr. Parke, are there any other special deputy and enforcement officers like you?

A. Not completely in my capacity, although we have a man set up at Anchorage. We have a new man there this year which will be broke into the same capacity as I have here.

Q. Will he do anything specially? Fishermen?

A. He will; yes. [80]

Q. And travel around like you do?

A. Yes. He is supposed to go into the bay with me this summer, around Kodiak area and get acquainted with it, and break him in to doing the same work.

Q. Then you won't have to go up into Bristol Bay?

A. Well, I am hoping not. But I think we can get a man that is efficient up there to check that area, and we can concentrate more on these other areas.

Q. He will be taking care of Bristol Bay, Cook Inlet, Prince William Sound?

(Testimony of Thomas Parke.)

A. Well, as we have it mapped out right now, we will have him take care after this year of Bristol Bay and Kodiak, and I will half the time take care of Cook Inlet and Prince William Sound. We have Cook Inlet; as you know, it has been a wild year up there last year, and it will be the same thing this year.

Q. What kind of a year?

A. I should say a wild year. It is a very good season by a new type of fishing, drift nets, as Mr. Anderson explained. It got started and the men made lots of money last year, the fishermen, and that means there will be lots more of them there this year.

Q. Now, you don't mean to indicate to the court that, if there were no non-resident fishermen here, that you would not have a job any more as special deputy and enforcement [81] officer? You don't mean to indicate that here?

A. No. As far as if there were no non-resident fishermen here, why it would be just a case of—

Q. I am asking you about your job. You would still have to occupy this position in order to collect fishermen's taxes?

A. I would occupy it just about as much as my capacity as drivers' licenses would be, I would say. I issue drivers' licenses through the office there and out of the office and go out here to any of these outlying towns and issue drivers' licenses. It would amount to about the same capacity. You know

(Testimony of Thomas Parke.)

yourself, drivers' licenses in a town like this, you have to put on a campaign every once in a while to see that everybody—and check them all—and see that they have licenses, and that is about what it would amount to as far as the fishermen are concerned. I don't think there would be any more evasion of it than there is with the drivers' licenses then.

Q. Now, these agents you have at all these points, where did you say they were? They were at all ports?

A. Practically. It depends on how small you would call ports.

Q. What about Elfin Cove? There are a few people live there and they have a fishing station.

A. Yes; there is an agent there also; Elfin Cove. And there is one at Pelican and Sitka, Port Alexander, Tyee.

Q. Kalinin Bay? [82]

A. No; there is none at Kalinin Bay. It is so close to Sitka there and, if there were enough call for it, we would. We usually figure the amount of demand there is for a license.

Q. Well, the trollers who get their fish around Kalinin Bay sell fish at Sitka, don't they?

A. No. They usually sell them at Kalinin Bay. It depends. The big ones ice, that is the non-resident boats, or a lot of them ice fish in that area. They take ice from Sitka ordinarily through an agreement from—

(Testimony of Thomas Parke.)

Q. You have an agent at Sitka, don't you?

A. Yes.

Q. Well, these agents, do they have enforcement powers or just pass out blanks?

A. No. They have enforcement powers to the extent—what we usually do is give them power to check boats. They go down and go through the boats in the harbor, watch them come in and out.

Q. Do you know any place in Southeastern Alaska where it is possible to sell your fish or complete the cycle of the operation by icing where you don't have an agent?

A. No, I don't. You would have a cycle there without icing.

Q. Let me see if I am mistaking the record and so you understand me. A troller will come in to a place and get ice and go out fishing and put the fish on ice and come back [83] and unload perhaps at a different place, unload his fish. Then it is necessary to go get some fresh ice. He can either get it at the same place where he unloads his fish or maybe, like the Kalinin situation, he has to go to Sitka to get ice. That is what I mean by a complete cycle.

A. That is only part of the fishermen. Nowadays it is more modern than it was. The big share of them, the competition is getting so thick among fish buyers, that very few of them ice any more. They will get probably a cent, maybe two cents a pound more for bringing their fish direct to, well

(Testimony of Thomas Parke.)

say, they bring them in here to the cold storage rather than sell them to a buyer out on the grounds. What they will do is probably out here at Funtler Bay, why the cold storage will have somebody buying fish for them out there at a price probably two cents below what it would be here in town.

Q. You mean some trollers don't use ice?

A. Very few of them use ice; yes. I would say probably twenty per cent.

Q. In other words the fish are picked up by the mobile fish buyers so rapidly that they don't have to have ice?

A. Twice a day, most of them; sometimes three times a day. Practically every harbor out here has a fish-buying stand. Well, there is Elfin Cove, and you have got Soapstone and Bingham and Hoctaheen and Greentop and Deer Harbor, Sawmill [84] Cove, Klag Bay. There's buyers in every one of those grounds. Wherever there is a boat anchored at night, why there will be buyers there usually. The competition is getting so strong for those fish.

Q. How many non-resident trollers are there come to Southeastern Alaska every year?

A. We can't give a figure right off because one license covers everything. You can buy a license right now for digging clams, and that is good for trolling the rest of the year. Right now we are selling licenses up at Cook Inlet, and they are digging clams on that license, and in the summer they will be—

(Testimony of Thomas Parke.)

Q. I just want to know, Mr. Parke, if you know how many non-resident trollers come to Alaska?

A. Offhand; no.

Q. How many non-resident purse seiners come to Alaska? Is that in the same category? You have no way of learning from your records?

A. No. It is not kept that way, but possibly the Fish & Wildlife could give you the figures on how many seine boats and so on, but so far as our license is concerned, why one license covers all operations.

Q. You mentioned in your direct testimony three boats had been reported and currently you weren't able to catch up with them. How many men does that involve? [85]

A. That was three in that case; one-man trollers.

Q. Now, the Kalinin Bay situation, three more non-resident boats that resulted in a fifty-dollar fine. How many men?

A. That is three again. Ordinarily there is one man to a troller.

Q. Now in the Craig business, four boats, 1948. Do you know how many men were involved there?

A. I would say four. It is possible there may have been another man below on one of those boats. Once in a while there will be two men, but ordinarily one-man boats.

Q. At Hoctaheen that involved nine men?

A. Yes.

Q. What year was that? A. 1947.

(Testimony of Thomas Parke.)

Q. Before this tax became effective?

A. Well, it was the other tax that was in effect, the twenty-five dollar. I don't believe it would make any difference if it was still a dollar and a half.

Q. I am just interested in fixing the time; that is all; Mr. Parke. Now, you have thirty-one cases that are being investigated now of non-residents, possibly non-residents, who bought resident licenses?

A. It is possible, yes. I wouldn't say; we are not sure of it until they are proven that way. But they have been reported that way, and it is very possible. [86]

Q. Is something on the license application itself that indicates that?

A. Yes. They are signed under—

Q. Suspicious circumstances?

A. Perjury. Well, no. Some are picked up that way, but ordinarily it is being reported by residents.

Q. Kind of a competition?

A. Yes. There is very much competition.

Q. The residents report on the non-residents?

A. Yes.

Q. And vice versa?

A. The biggest part of my enforcement, the help is from the residents. They keep track of them. You will have a good friend among them but, if he steps out of line, why they report him right off.

(Testimony of Thomas Parke.)

Q. Then your experience is somewhat like Mr. Anderson's here. The residents help fishery law enforcement out in Bristol Bay?

A. I had a case in Bristol Bay——

Q. And violation of the liquor laws up in Bristol Bay?

Mr. Dimond: I object, your Honor. There is no point to counsel's remark.

The Court: It is kind of conversation rather than examination.

Mr. Paul: I would like to draw an inference, too. [87] It seems, your Honor, that everybody seems to enforce the law except——

Q. Now, Mr. Parke, you have prepared yourself as well as you could to testify here, didn't you? I mean, you haven't gone into extensive research of your records?

A. No; I haven't gone into extensive research. I read over my logs and reports and so on.

Q. Did you ever have occasion to go over any telegrams and reports made about the number of non-residents, certain non-residents, not having proper licenses or any licenses?

A. Yes. We have telegrams. I will say on this deal at Petersburg we have telegrams and letters to the effect——

Q. Are you able to make any estimate from what information you believe is reliable on the number of non-resident trollers who have not bought licenses or bought improper licenses?

(Testimony of Thomas Parke.)

A. Well, no, I wouldn't be prepared to say that. After all that is supposed to be my job. I should say one hundred per cent licensed. It is my job to see that, and it would be a slap in the face if I didn't say that.

Q. Do you want to say it is one hundred per cent now?

A. No, I wouldn't say it is one hundred per cent due to the fact that there is some—there is more on the seine boats.

Q. On trollers, first?

A. Well, on the trollers, I wouldn't give a figure as to how [88] many were without. I hear reports from different places and run them down, and some are fairly authentic, and again some that are not. You will hear that there are a dozen boats, and I made one trip out to Deer Harbor one time especially, and there were supposed to be a lot of boats out there without a license. Well, they pulled a fast one and were ducking the residents to try to prove it. When I got out and ran them down, why they were licensed. But a big share of the deals are authentic when they are reported.

Q. Well, let's go over to the non-resident purse seiners then. Is that somewhat the same situation as the trollers?

A. We have another problem there. It comes up in the spring of the year. We have records. I can't give the date exact, but it was in the early spring. I was going north out of, through Peters-

(Testimony of Thomas Parke.)

burg, through the Narrows one afternoon when they were coming north, and we have other deals, several of them, out around Elfin Cove.

Q. I didn't want to go into the reasons for your difficulties any more than I have to. All I am asking now is, from the information you have, can you form any reliable estimate, or from the reliable information you have can you form any estimate as to the probable number of non-resident purse seiners who bought improper licenses or none at all?

A. Why, no. Our figures would show—well, they have thirty-one [89] down there now that haven't.

Q. We have mentioned the thirty-one.

A. And we see them going north in the spring, and they don't need a license, and they are on their way up; they are going up to Prince William Sound; and in the fall they come back down. They have fish scales on their boats and still no licenses. They are not fishing either time.

The Court: What do you mean—they don't need a license when they go up?

A. Well, the law doesn't require them to have licenses until they are fishing, and they aren't fishing.

The Court: Well, if they are going up to fish, it seems to me they are engaged in fishing.

A. The intent is that it should be, but we haven't been able to enforce it to the extent that they still could be taking that boat north and putting somebody else on to fish it.

(Testimony of Thomas Parke.)

The Court: My point is that any boat that is operated up here for the purpose of fishing is engaged in fishing even when it is on the way up through Alaska waters.

A. It seems like it should be the law, but we haven't been able to do anything until they engaged in commercial fishing. After all they can go out here and fish for their own use without a license. The intent of it, I believe, is that. The outcome is they go north and come south. [90]

Q. You mean your agent or you at Petersburg watch these boats go by and don't do anything about it?

A. Well, no, we can't. There are a lot of boats that do go north but they put a reliable man on as a skipper to take the boat north, and they may fly him back.

Q. Did you ever try to do anything about it through the District Attorney or Attorney General?

A. We have tried to, and they have told us that when they were fishing they would buy licenses and not until then.

Q. When was this that you got such an opinion?

A. Well, from the fishermen. I was told that in Pelican one time there. The fellows were taking off, and they group up there, usually eight or ten. They will start for the south and—

Q. When was it that you got this opinion from the Attorney General that a man was not engaged in fishing when he was approaching the fishing grounds?

(Testimony of Thomas Parke.)

A. Well, the law reads—engaged in fishing.

Q. You didn't get an opinion from the Attorney General then or from any District Attorney.

A. I can't say offhand. They are my instructions, and I carried them out. I don't know where the opinion came from. You can take it up with Mr. Mullaney probably.

The Court: Well, it seems to me like the law itself is deficient in not defining fishing properly. It requires [91] actual engaging in fishing operations; that is in catching fish instead of engaging in some activity connected therewith.

Q. You were up in Bristol Bay last year, were you, Mr. Parke? A. Yes, I was.

Q. How many canneries did you see where there were two averages?

A. Three at least that I know of.

Q. Three out of fifteen?

A. You hear the talk every place, but I remember of looking at the scoreboards at Diamond J and Bristol Bay Packing Company and N & N, that is Alaska Packers, and presumably they are at each one. They all talked about who was high man and who was high resident and who was high non-resident. I think we have a high resident man in town here.

Q. Well, that was enforced several years ago but not last year?

A. Last year it was on the scoreboard.

Q. Just one average now?

(Testimony of Thomas Parke.)

A. Two different averages is what showed at Diamond J last summer. In fact, I couldn't say, but it is possible I have a picture of it. We have a picture of the operations there, and the board is right out on the front of the cannery where they are putting up the new building.

Q. What are these part-time Bristol Bay gill-netters? A. What was that? [92]

Q. I said, what are these part-time Bristol Bay gill-netters?

A. Men that come in there and, oh, there may be a webman, and somebody gets sick or goes home or every once in a while generally among that crowd of people there will always be somebody that has a death in the family or something of that sort, and he will pick up and leave, and they will put another man on, or another man will be sick for a few days. We have one instance come up right now where two fellows fished part time up there while the men were off, and the license was evaded.

Q. Residents or non-residents?

A. Non-residents, both of them.

Q. The company didn't collect the tax?

A. No, didn't collect it; no; didn't hold it out. The application was held out and the license was issued and when I was to settle with them and collect for that why it was voided.

Q. That was a mistake on the cannery's part?

A. I don't know whether it was a mistake on the cannery's part. They voided the license after it

(Testimony of Thomas Parke.)

was issued, and turned back, and said, "Why no, this man didn't fish. He doesn't need a license." And that license was voided, and since the investigation we found that that man did fish under an affidavit of his, and also he settled.

Q. The non-resident fisherman, he was fully co-operative; it [93] was the cannery?

A. The cannery in that case; yes. In his affidavit he claims that he had been deducted.

Q. What are the part-time fishermen?

A. In Bristol Bay?

Q. Among the non-residents?

A. It would be that and where the season is cut short and they are taken off.

Q. Now, just how many times has the season been cut short?

A. Well, the Fish & Wildlife could probably give you definite figures on that.

Q. Well, what do you know?

A. In forty-six they cut off a considerable number of boats.

Q. We are talking about curtailment of the season, not the boats.

A. Well, what happened, they curtailed the webbing and the amount of fish they take, is all they curtail. If the escapement isn't as much as they think it should be, why they say, "We have to cut down somewhere."

Q. Yes; I understand that. I want to know what this curtailment of the length of the season is.

(Testimony of Thomas Parke.)

A. Not the length of the season; it is the amount of web that is allowed in the water.

Q. That is curtailment of gear. Then we are agreed on this. There has been no curtailment of the length of any season [94] in recent years?

A. Why no.

Q. That you know of?

A. The season is cut off about three or four days short this year. On the Nushagak area, I couldn't say exactly, but it was a matter of a few days anyway that were cut off.

Q. And that three or four days that was cut off the length of the season, did that result in any difficulty with tax collection through the cannery?

A. Well, yes. Well, a case like that where they cut the season completely off, it wouldn't. There are men that are full-time fishermen there. But if they cut off part of it, where they cut off boats earlier, and the gear—

Q. We will get to the boats and the gear later on. But I am talking about the difficulty in collection of taxes where the length of the season has been curtailed by three or four days. Is there any such difficulty?

A. No; outside of a big powwow among the fishermen. They would, if they are getting gypped at all, they will holler that they didn't get a full season's fishing out of the amount of the license.

The Court: Well, how about your time? Doesn't a shortening of the time for fishing also shorten your time for collection?

(Testimony of 'Thomas Parke.)

A. Well, yes; it does. I spent considerable money up there [95] this summer just because of the shortness of the season in order to get around up there. I couldn't wait. Ordinarily I could take tenders and make the rounds and so on and wait until there was a crowd so we could charter a plane, but the season was so short that you would have to make these deals right away, and it cost the Territory a lot of money.

Q. We understand that. You remember one occasion where the season was cut down three or four days. Now, are there any other instances that you know of where the season was cut down?

A. I couldn't say. I do know that it is probably agreed ahead of time.

Q. I just want to know if you know of any instances where it was; not what might or how it was cut down.

A. Well, in the Bering Sea alone, and Bristol Bay?

Q. And Bristol Bay.

A. Well, this year one instance——

The Court: You have already testified to that, haven't you? There is no use of going over it again.

Q. Any other instances?

The Court: If it was cut down anywhere else in the Territory outside of Bristol Bay, you may testify to that.

A. Well, I wouldn't say any other time offhand.

Q. Let's get over to the curtailment of the

(Testimony of Thomas Parke.)

amount of gear. [96] Does that result in part-time fishermen in the middle of the season?

A. Well, it will be a full-time fisherman, but if they lay off and curtail the gear the poorest man goes home first, and that means you are curtailing fishing.

Q. When was the gear curtailed that you know of?

A. In forty-six.

Q. In the middle of the season?

A. Along probably over beyond the middle of the season all right.

Q. Where else during the season?

A. Well, they figure—

Q. I mean, what other year during the season?

A. I wouldn't be able to tell you offhand, but I do know in forty-six that they curtailed the gear and to the extent—

Q. Were you in Alaska before 1946 when you took this job of enforcement officer?

A. Yes, I was.

Q. Was there any way of your learning of the history of Bristol Bay for the past ten years?

A. No, there wasn't. I didn't. I heard of Bristol Bay, but I had nothing of any interest with it.

Q. So, you had a problem of collecting taxes because of the curtailment of the season in 1946; is that your testimony?

A. Yes. [97]

Q. Curtailment of gear. What did that problem amount to?

A. Of just merely so many licenses that weren't turned over at the time.

(Testimony of Thomas Parke.)

Q. How many?

A. Well, I couldn't tell you offhand. I didn't study up on it. I don't have those figures available.

Q. Residents or non-residents?

A. Non-residents.

Q. Non-residents?

A. Well, I wouldn't swear to it, but I do know that——

Q. If they lay off the poorest fishermen first and the residents have a lower average, does that mean they lay off the residents first?

A. No. Your residents, a good share of them are right there, and they might as well leave them. They are not feeding or anything, and they might just as well let them fish the rest of the season. It is the expensive men they are going to get rid of. The poor expensive ones they get rid of first.

Q. What do you mean—the more expensive ones?

A. Well, if they shipped a man up from Seattle——

Q. The contract requires they be shipped back?

A. Yes; they ship him back, sure, and they are feeding him all the time he is up there and, if he is not producing and the other fellow is less expensive, why naturally they get [98] rid of the expensive one first.

Q. Did you have any other license-collecting problem either with the residents or non-residents up at Bristol Bay last year except this business of the tendermen?

(Testimony of Thomas Parke.)

A. Yes, I did. I had considerable trouble with the fishermen themselves, the non-resident fishermen. They don't understand. They just weren't going to pay it.

Q. They don't like the idea of paying fifty dollars while residents were charged five; was that the reason? A. I think it was; yes.

Q. Was there any other reason that you know of?

A. Well, no. I think that would be the reason for it. I think if it had been probably two dollars and they could have got out of it, they would have tried that too. It is just a matter of expenses if they can save that by a little persuasion someplace here and there.

Q. Is that what they told you or is that just your speculation?

A. Well, all I know I had meetings with the big share of the fishermen themselves.

Q. Did you get any idea at any time that there would be any difficulty of collection if the non-resident license was five dollars, the same as the resident license? A. Yes.

Q. Did anyone ever suggest that to you up in Bristol Bay last [99] year?

A. Well, if it was exactly the same, why in that area itself there probably would be more of a—

Q. I am asking whether you learned from any non-resident fisherman up there that he had any

(Testimony of Thomas Parke.)

objection to paying a tax that was equal to the resident?

The Court: Well, what would the view of one fisherman have to do with this case? It seems to me that from the testimony of the witness here it would appear that non-residents, at least some of them, will evade paying any kind of tax even if it were five dollars. So, what one of them might think about it would be somewhat immaterial.

Mr. Paul: He stated that in generalities, your Honor. Now I would like to go into what the generalities are.

The Court: He stated what?

Mr. Paul: He gave us the impression that non-residents tried to avoid this tax because of their stinginess, let us call it; their economy. Now I would just like to know if that is really the basis or if that is just his speculation.

The Court: Well, but your question is directed to what one fisherman might have said and that wouldn't have any tendency to prove what all of them or a considerable portion of them might—

Mr. Paul: I meant to frame my question to allow the witness to identify any number and, if he said even one— [100]

The Court: Well, one fisherman isn't going to help the Court out any. What one fisherman might have said, that just represents his individual view.

Mr. Paul: All right.

Q. Were there any fishermen then, non-resident

(Testimony of Thomas Parke.)

fishermen, who said that they had any objection to paying this tax?

The Court: The question is whether you know whether there would be any difficulty of collecting this tax if it were five dollars for non-residents.

Mr. Paul: Now, your Honor, just a moment. I am not going to ask this question—if he knows. That is the way the information was brought out on direct examination. I am engaged in testing where his knowledge comes from, and it can't be answered—you can't arrive at it.

The Court: Well, his knowledge of what? Let's see what you are trying to get at here. I am just trying to expedite this thing. Now, what are you trying to get at?

Mr. Paul: What the difficulty of collection was; whether it was based simply upon the discrimination that is the very subject matter of this suit, or some other objection.

The Court: In any event it would have to depend on what he knew. So, the objection to the use of the word "know" in my question certainly doesn't seem to be valid.

Mr. Paul: Well, I want details now. That is my point. I want details. [101]

The Court: Well, you better reframe your question, and let's get along here.

Q. Were you able to learn of any other reason, as was related to you by any of the fishermen, non-resident fishermen, in Bristol Bay, if they had any

(Testimony of Thomas Parke.)

objection to the payment of a tax the same as the resident tax?

A. Why, no. I wouldn't say that. I didn't have any fisherman come out and say, "Well, here I will give you five dollars the same as the residents." It is just naturally human nature he wouldn't do it, and it is natural.

Q. You didn't hear any objection to paying equal tax; the objection you heard was they didn't want to pay fifty dollars when the residents were paying five?

A. It never came to that. The only way I could get an answer to that would be to say, "Would you fellows be willing to give me five dollars instead of fifty?" And there is no—you know what the answer would be on that. So, it just didn't come up that way.

Q. Nobody brought it up voluntarily?

A. No.

Q. Now, what is this business about non-resident trapmen, where the canneries don't report all their traps?

A. That merely enters into just a case of evasion there due to—I wouldn't say purposely or otherwise.

Q. Is that something the non-resident trapmen do? [102]

A. No. Ordinarily it is, I am led to believe, the canneries pay that tax.

Q. There is some sort of an agreement whereby the employer pays the tax?

(Testimony of Thomas Parke.)

A. That is what I am led to believe. They claim in years back they weren't getting the proper pay with the rest of them and by paying the tax——

Q. The ones, as far as you know, the ones that were doing wrong would be the canneries?

A. Probably. Well, in that case it would be yes. And then——

Q. That is to say——

A. You have more deals where——

Q. The evasion of tax?

Mr. Williams: Your Honor, I suggest that counsel let the witness finish the answer to one question before he shoots another question at him.

The Court: Yes. As I see it, it makes no difference who is to blame for the difficulty in collecting the tax. It is a difficulty in collecting the tax no matter who it is. The fact that the cannery might be to blame for it doesn't alter the fact that it constitutes one of the difficulties in collecting the non-resident tax.

Mr. Paul: I agree with your Honor.

Q. Now, you say that the problem of tax collection among resident seiners in Southeastern Alaska is a small problem? [103]

A. Yes, it is.

Q. Because you can get them before or after the season. Isn't it wrong to get a license after the season when they should have a license before that?

(Testimony of Thomas Parke.)

A. Yes. That is where the enforcement comes in. If you can pick them up after the season, you can do what you please with them. But as a rule they are tied up with somebody. They ordinarily have to be supplied, and that is included with it.

Q. Now, how many resident—how many non-resident seiners have you failed to collect the tax from? Is that that thirty-one you were talking about here a while back; thirty-one cases you suspected?

A. All fishermen; that is all classes.

Q. All classes of fishermen. How many non-resident seiners have you failed to collect the tax from for evasion?

A. Well, it would be answered the same as the rest of it. As a whole, why fishermen are fishermen, and one license covers all types of fishing.

Q. You have no way of determining in your records?

A. No. There is no customs to check them coming in or check them going out.

Q. What about the halibut fishermen, do they get a license from you?

A. They did until this spring. The old law until this year [104] was written in such a way that the resident—it was the non-resident fishermen, the troller and seiner and the gillnetter had to have licenses, and the resident—no, it was a non-resident who uses hook and line in trolling, and the resident was fishermen of all classes needed a li-

(Testimony of Thomas Parke.)

cense and, therefore, we had to enforce the resident to buy, resident halibut men to buy a license. And when this law—they changed it this year—put halibut fishermen in on that same class—but that has been overruled, so that was stopped when the court ruled it was discriminatory, I believe.

Q. There is going to be no problem of collection among non-resident halibut men?

A. As the law stands right now.

Q. There is no law now?

A. There is no law now; that is right.

The Court: Well, I can see where my decision has been misconstrued.

Mr. Paul: Well, we won't depend on the witness for that, your Honor.

Q. You started to testify about some fish being flown out. What is that situation? I didn't get all that, Mr. Parke.

A. There is some men operating up around—are you acquainted in the Yakutat area, been in there?

Q. Oh, yes. [105]

A. Do you know the rivers?

The Court: It doesn't make any difference particularly where it is flown from. If that is what makes the difficulty, why we can eliminate the details unless he wants them or questions what you say.

Q. Are there non-resident fishermen up there?

A. Yes; there are a few get in there.

(Testimony of Thomas Parke.)

Q. How many?

A. Enough—our records at the office could show it. I couldn't swear to it offhand, but there are enough in there to pay to go in and get them.

Q. Four, is it?

A. I didn't give any figure on it.

Q. Well, I am asking you. Is it four; four non-resident fishermen?

A. I couldn't say offhand.

Q. Is it four?

A. I wouldn't say it is four.

Q. Fifty then?

Mr. Dimond: He said he didn't know, your Honor.

The Court: He said it four times now that he didn't know.

Q. Now, do you recall of any other particular enforcement problem—just a moment. I will withdraw that question. Now, why is it that you have to go to Bristol Bay to collect [106] the taxes throught the canneries?

A. Well, due to, I would say, evasion, and the expense of going in there for what evasion shows up warrants the price of going in, and then for the good of the canneries. It is an accommodation to them; why we do go in.

Q. Do what?

A. For the accommodation. That season is short, and by the time they send those applications—they won't know until the day the fishermen are

(Testimony of Thomas Parke.)

on the grounds how many. Sending that all in and back out, and it takes time, and it takes time to issue them and to check on them. You would have to go in anyway for enforcement and so it is just as easy to go around and check. You would have to check the canneries anyway to see what was doing, otherwise it would be abused so much that—

Q. Well, now, when has it ever been abused?

A. Well, I mentioned a few minutes ago.

Q. One hundred and twenty tendermen last year?

A. One hundred and twenty times fifty is a lot of money.

Q. All right. Now, what other times has this system being used up there looked like it might be abused or was abused?

A. Well, I mentioned two more a few minutes ago that had fished and left applications that weren't turned in.

Q. That was two. What else?

A. If I had a chance to go back through the records, I could [107] show you more, but offhand, why, I can't.

Q. Can you give us any estimate as to how many more you might be able to show?

A. There is at each cannery—it comes up. It is a hard problem to show because it is ordinarily taken care of in a personal way. I get along very good with the cannerymen there, and you come in and just let it pass as a mistake. You can go in, and

(Testimony of Thomas Parke.)

they will have sixteen fishermen maybe, and you will figure, well heck, there is two or three men, only they forgot about that. Well, it is just as easy and a lot better to let it go as a mistake. You get your money and just pass it up. You get a lot of money out of that, and there is no hard feelings at all. You don't put that down.

Q. You are engaged in a public relations job then with the canneries; that is the bigger part of your duties up there, isn't it?

A. Well, if you want to call it that. If you can get the money—

Q. Your only real benefit in going to Bristol Bay is to collect from two part-time fishermen and try to persuade these one hundred and twenty tendermen to pay the tax?

A. I think Mr. Anderson told you approximately how many fishermen fish up there, and we issue a license to all of them.

Q. You actually make out the licenses? [108]

A. I actually issue the licenses right there. You can go into the cannery—

Q. The Territory doesn't have any agent at each cannery up there? A. No, they don't; no.

Q. Is there any agent at all in Bristol Bay?

A. No, there is not. Well, we do; we have a limited agent at Dillingham with instruction that he is only to issue to the occasional local resident in town, but as far as if we put an agent in there, we would put him in, if we had to put him on a com-

(Testimony of Thomas Parke.)

mission basis, why you can tell, multiplying the number of fishermen by fifty, how much commission would have to be paid up there, and by far the saving to the Territory is much more than to send me in.

Q. What is the appropriation for your office in 1949?

Mr. Dimond: I object to that, your Honor.

A. I don't know.

Mr. Williams: I object, your Honor. This office has a lot of things to do.

The Court: Objection sustained.

Q. Well, let's put it this way then. What was the amount of money spent by the Department of Taxation in 1949 to prevent evasions of payment of non-resident fishermen's license tax and resident fishermen's license tax?

A. I don't know. It would be up to Mr. Mulaney to give you [109] if he could.

Q. Could you give a close or approximate figure?

A. It is not my business to have those figures.

Q. Pardon me?

A. It is not my business to have those figures. My end of it is issuing and enforcement, not the expense of it.

Q. Don't you know how much it costs for you to travel around?

The Court: But the question is here, how much is attributable to the residents and how much to non-residents. I don't see how he could possibly know

(Testimony of Thomas Parke.)

that. It would be impracticable to make the segregation.

Mr. Paul: I think so too, your Honor.

The Court: Well, then let's not go into it.

Mr. Paul: Well, I would like the witness to say so.

The Court: He has already said he doesn't know of any way that he could tell that.

Mr. Paul: All right.

Q. You collect a license tax from tendermen, don't you, and fishermen?

A. Yes, I do; that is part of it, except Bristol Bay this year which we haven't collected to date, which we have a guarantee for if the law is valid.

Q. Have you ever been up in Bristol Bay, Mr. Parke, before the season started?

A. No, I haven't; I have never been in there. Ordinarily I, [110] figure to get in there after things are settled down for the convenience of the canneries.

Q. Do you know when the men sign up the applications for fish licenses?

A. No; I am not there when that is done.

Q. I am asking if you knew, either from what the canneries have told you or what somebody else told you?

A. What is that?

Q. When the men sign applications for fish licenses?

A. Well, from what I have been told by the fishermen themselves, is that they sign that when

(Testimony of Thomas Parke.)

they first get there. They have to sign, oh, several different receipts.

Q. Two or three days before the actual fishing starts then they sign up all these papers?

A. I couldn't say whether it was two or three days or two or three days after. I ordinarily figure to get in there about a week after, well, about five days after the fishing starts. If I were up there the first day of the season, why everything is in a mess and they don't know where they are.

Q. I don't mean you have to have an explanation on that. You don't know that the men sign up all these papers including fish license applications before the season starts?

A. No, I don't know; as long as they are signed before I get there. [111]

Q. They are all signed up a week after, except these one or two cases? A. Yes.

Mr. Paul: That is all.

The Court: Is the money attached to the application?

A. In some instances it is, but ordinarily the cannery just gives you a check. There are a few places where you will have money attached to every application.

The Court: Well, what is it, a voluntary proposition whether or not they sign an application?

A. No. They must sign the application. Well, if it were, oh, say for instance, if they walked into the office down here now, they would sign the appli-

(Testimony of Thomas Parke.)

cation right in front of me, and I would issue the license there, but through an agreement for the canneries in order for them to get their fishermen up there and get them in order—why, a lot of those applications I have noticed have been made out by the canneries, answering the questions, where they have been made out on the typewriter, and no fisherman knows how. They have all been made on the same typewriter and just signed by the man himself. He reads it over presumably and signs it. And a few instances where the money may be coming right out of their pay and is attached to it in dollars and cents, but we try to avoid that all we can in order to keep from carrying so much cash. [112]

The Court: That is all.

Mr. Dimond: That is all.

(Witness excused)

Mr. Dimond: I have no more witnesses, your Honor.

Mr. Paul: No rebuttal.

Whereupon respective counsel waived the reporting of the arguments, and Court recessed for ten minutes before proceeding to hear the arguments.

REPORTER'S CERTIFICATE

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. Oscar Anderson and Alaska Fishermen's Union, a labor union acting on behalf of certain of its members, vs. M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, No. 6102-A of the files of said court;

That I reported said cause in shorthand and myself-transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 113, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause on the date hereinbefore mentioned, to the best of my ability.

Witness, my signature this 10th day of June, 1950.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed] Filed June 23, 1950.

CLERK'S CERTIFICATE

United States of America,
District of Alaska—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 159 pages of typewritten matter, numbered from 1 to 159, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the

record prepared in accordance with the Designation of Portions of the Record; Supplemental Designation of the Record; Statement of Points and Stipulation to correct Transcript of Record on Appeal of Appellant on file herein and made a part hereof, in Cause # 6102-A, wherein Oscar Anderson and Alaska Fishermen's Union, is Plaintiff-Appellant and M. P. Mullaney, Etc. is Defendant-Appellee as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

I further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Twenty-Two Dollars and 85/100 has been paid by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the Seal of the above-entitled court this 20th day of June, 1950.

J. W. LEIVERS,

Clerk of the District Court.

[Seal] By /s/ P. D. E. McIVER,
Deputy Clerk.

[Endorsed]: No. 12586. United States Court of Appeals for the Ninth Circuit. Oscar Anderson and Alaska Fishermen's Union, Appellants, vs. M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed June 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit Court

No. 12586

OSCAR ANDERSON and ALASKA
FISHERMEN'S UNION,

Appellants,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Appellee.

APPELLANT'S STATEMENT OF POINTS

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every

section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article 1, Section 8, and Article 3, Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.

2. The finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax from non-resident fishermen is required to collect or enforce the same is not substantiated under the testimony and evidence.

3. Conclusion number one (1) of the District Court that Chapter 66 of the Session Laws of 1949, Laws of Territory of Alaska, does not contravene the Organic Act and United States as enumerated in Point 1, is wrong.

4. Conclusion number two (2) of the District Court and Chapter 66 of the Session Laws of 1949 is valid because it rests on substantial differences bearing a fair and reasonable [117] relation to the object of the legislation, is wrong.

5. That Conclusion number three (3) that the \$50.00 license fee imposed on non-resident fishermen under Chapter 66 is reasonable and not excessive, is wrong.

6. That Conclusion number four (4) of the District Court that Chapter 66 is a valid Act, and the Complaint and amended complaint should be dismissed, is wrong.

7. That the judgment and decree entered in said cause dismissing the complaint and amended complaint is in error.



/s/ ROY E. JACKSON,

Attorney for Appellants.

[Endorsed]: Filed July 14, 1950. [118]

[Title of District Court and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals
for the Ninth Circuit, San Francisco 1, California.

You are requested to include in the printed record to be prepared in this cause the following documents, to wit:

1. Complaint.
2. Amendments by interlineation.
3. Amended Answer.
4. Reporter's Transcript of Testimony.
5. Stipulated Notes of January 19, 1950, Perpetuated Testimony.
6. Journal entry at page 385, of March 14, 1950. Page 140.
7. Defendant's Answer to Interrogatory No. 3, filed March 15, 1950.
8. Defendant's Answer to Interrogatories, filed March 13, 1950.

9. Plaintiff's Interrogatories numbered 1, 2 and 3.

10. Plaintiff's Waiver of February 4, 1950.

11. Opinion of Court.

12. Findings of Fact and Conclusions of Law.

13. Judgment.

14. Notice of Appeal.

15. Cost Bond on Appeal.

16. Designations of Portions of the Record. [119]

17. Supplemental Designation of the Record.

(Index of Clerk's Transcript of Record has not been supplied this office. We trust you can identify all the documents in the case without difficulty.)

/s/ ROY E. JACKSON,

Attorney for Appellants.

[Endorsed]: Filed July 14, 1950. [120]

No. 12586

**United States
Court of Appeals
For the Ninth Circuit**

**OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,**

Appellants,

vs.

**M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,**

Appellee.

**Appeal from the District Court
for the Territory of Alaska
Division Number One.**

**Proceedings Had in the United States Court of Appeals
for the Ninth Circuit**

**United States Court of Appeals
for the Ninth Circuit**

Excerpt from Proceedings of Wednesday, December 13, 1950.

Before: Denman, Chief Judge;
Orr and Pope, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Carl B. Luckerath, counsel for appellants, and by Mr. John H. Dimond, Deputy Attorney General of Alaska, counsel for appellee, and submitted to the court for consideration and decision.

**United States Court of Appeals
for the Ninth Circuit**

Excerpt from Proceedings of Monday, June 25, 1951.

Before: Denman, Chief Judge;
Orr and Pope, Circuit Judges.

[Title of Cause.]

**ORDER DIRECTING FILING OF OPINION
AND DISSENTING OPINION AND FIL-
ING AND RECORDING OF JUDGMENT**

Ordered that the typewritten opinion and dissenting opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

United States Court of Appeals
for the Ninth Circuit

No. 12,586

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Appellants,

vs.

M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,

Appellee.

June 25, 1951

Appeal From the District Court for the Territory of
Alaska, Division Number One

Before: Denman, Chief Judge;
Orr and Pope, Circuit Judges.

Pope, Circuit Judge.

OPINION AND DISSENTING OPINION

Chapter 66 of the Session Laws of Alaska, 1949, enacted March 21, 1949, requires all commercial fishermen who take fish from the fishery resources of Alaska to obtain an annual license from the Territorial Tax Commissioner. For such license the fee charged a resident fisherman is \$5.00; that charged a nonresident fisherman is \$50.¹ The statute

¹The statute appears to limit issuance of licenses to one who is a citizen of the United States or who "possesses a valid declaration of intention" to be-

also prohibits other persons from employing, or purchasing fish from, any unlicensed fisherman.

Anderson, Secretary-Treasurer of the appellant Union, and the Alaska Fishermen's Union, on behalf of some 3200 of its members who are nonresidents, and who fish in Alaska each year, brought this action seeking a declaration of the court that Chapter 66 is unconstitutional and void insofar as it seeks to exact the \$50 nonresident license fee, and praying for an injunction restraining the appellee Commissioner of Taxation from making collection.²

The court made findings that "6. Thousands of nonresident fishermen come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from twenty days in Bristol Bay to two months elsewhere. Said nonresident fishermen come to the Territory shortly before the fishing season and depart therefrom immediately after the close of the fishing season. Said nonresidents own no property in the Territory, and are not required by shipping laws to enter or clear upon arrival in or departure from the Territory. During the time

come such, and hence would seem to collide with *Takahashi v. Fish and Game Commission*, 334 U. S. 410. This aspect of the law is not involved here.

²It appears that Anderson, since his election as Secretary-Treasurer of the Union, has not fished, and his residence is not shown. No question has been raised as to whether the Union is a real party in interest, or has the capacity to sue, hence we assume its right to sue on behalf of its members who are nonresidents of Alaska. Cf. note 10, *United Public Workers v. Mitchell*, 330 U. S. 75; p. 82.

said nonresidents are within the Territory, they enjoy the protection of local government. 7. Defendant and his deputies have detected evidence indicating large scale evasions of payment of the fishermen's license tax by nonresident fishermen. In order to enforce collection of this tax from the nonresident fishermen, defendant found it necessary to send an enforcement officer each year throughout the various fishing areas located along the 26,000 miles of Alaska coastline. The difficulties encountered by defendant and his deputies in the collection of license taxes from non-resident fishermen and the detection and apprehension of those who evade payment of this tax are almost insuperable. 8. Little difficulty is encountered by defendant and his deputies in the collection of the license tax from resident fishermen. There are few attempts at evasion by this class of fishermen, and since resident fishermen are within the jurisdiction of the Territory after the close of the fishing season, the detection and apprehension of those who do evade payment of the tax is not difficult. 9. It is much more difficult and expensive to collect the license tax from nonresident fishermen than it is from resident fishermen. Approximately 90% of the cost of collecting the fishermen's license taxes is incurred in collecting or attempting to collect said taxes from nonresident fishermen. 10. The net annual earnings of trollers for a season of four or five months average approximately \$3,500.00; of gill netters in Bristol Bay approximately \$2,500.00 for a season of twenty days; and the average earnings of those employed on can-

nery tenders and traps are approximately \$1,500.00 and \$2,000.00, respectively."

The court concluded that Chapter 66 did not "contravene the Fourteenth Amendment to the Constitution, the Civil Rights Act, or the Organic Act of Alaska; does not encroach upon the admiralty jurisdiction of the United States or affect is substantial uniformity; and does not burden interstate commerce in violation of Article I, Section 8, of the Constitution. The classification of fishermen into residents and nonresidents as contained in Chapter 66 is valid because it rests on substantial differences bearing a fair and reasonable relation to the object of the legislation. The \$50.00 license fee imposed on nonresident fishermen under Chapter 66, is reasonable and not excessive."

Accordingly, the complaint was dismissed.

Upon this appeal Anderson and the Union contend that because of its discriminatory features the Act is in violation of the Organic Act (48 USCA §21, et seq.)³ the Civil Rights Act, (8 USCA §41),⁴

³"The Constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." (48 U.S.C.A. §23.)

⁴"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

that portion of §2, Article IV of the Constitution relating to privileges and immunities of citizens, and the equal protection clause of the Fourteenth Amendment. It is also attacked as a burden on interstate commerce and void for that reason. Appellants further assert that the findings above quoted are not sustained by the evidence.

In disposing of the contention that the Alaska statute imposes an unconstitutional burden upon interstate commerce the trial judge said: "Since * * * it is well settled that a tax of this kind is not a burden on interstate commerce because the taxable event—the taking of fish—occurs before the fish have entered the flow of commerce, *Toomer v. Witsell*, 334 U. S. 385, 394, * * * these contentions will not be discussed."⁵ We think the problem presents more difficulty than the trial judge thought.

We assume that the trial court had in mind no more than the fact that the product of the canneries would ultimately be sold in the States. But a reference to the court's findings and to the evidence in the record discloses that the interstate shipment of the product is only one part of the complete picture. It is only the final end of the interstate assembly line which puts the fish on the tables of the consumer. The other end of this great integrated enterprise, which follows uniform patterns from year to

⁵The court's statement was taken from language used in the cited *Toomer* case with reference to a tax of one-eighth cent a pound on green shrimp. There is no comparable provision in the Alaska enactment.

year, concerns the massive migratory movement of the fishermen from their homes in the Pacific Coast States into Alaska for the annual fish season.⁶ The evidence shows that some of these fishermen are employed by the canneries and others sell their catches to the same canneries from whence the product is marketed in the States. While local Alaskan residents are also fishermen employed in the same enterprise and in the same manner as the nonresidents; yet the greater number of fishermen and the best qualified ones are those who reside in the States and who come into Alaska for the fishing season only.^{6a}

Thus it is apparent that so far as Alaska fisheries

⁶The court found: "Plaintiff labor union maintained this action for the benefit of its members who are classified as fishermen and who are classed as nonresidents, and who live principally within the States of Oregon, Washington and California, and who are employed by fish packing companies who operate fish packing canneries within the Territory of Alaska in the various fishing areas, and who employ fishermen in fishing with gill nets, trap fishermen, crews of tenders and other floating equipment used in the handling of fish in the Territory of Alaska."

^{6a}The evidence was that the nonresident members of the Appellant Union "are mostly flown into Alaska" by the employers. Earlier records in this and the Supreme Court indicate that the California fishermen are moved back and forth in the employers' ships. *Aragon v. Unemployment Compensation Commission, etc.*, (9 cir.), 149 F. 2d 447, 450; *Alaska Packers Assn. v. Comm'n.*, 294 U. S. 532, 542.

are concerned, they are in the center of a great interstate movement which begins when the fishermen start north to fish and terminates with the delivery of the processed product to the dealers in the States. The catching of the fish is but an interlude in this large flow of commerce.⁷

This commerce is not "interstate" in the sense that it is from one State to another State. But this court has held that commerce between the States and a Territory which has become a part of the United States is interstate commerce. *Inter-Island Steam Nav. Co. v. Territory of Hawaii*, 96 F. 2d 412, 416, 417, and such has been assumed to be true in *MeLean v. Denver & Rio Grande R.R. Co.*, 203 U. S. 38, 49; *Hanley v. Kansas City Northern Ry. Co.*, 187 U. S. 617, 620; and *Inter-Island Co. v. Hawaii*, 305 U. S. 306, 313.

⁷B. W. Denison: "Alaska Today," The Caxton Printers, Ltd., Caldwell, Idaho, 1949, p. 166: "The fisheries of Alaska are the backbone of the Territory's economy with regard to permanent value, employment, and taxable wealth. More than one-half the entire revenue collected by the Territorial government comes from the fisheries. The products of these fisheries and the supplies and equipment necessary to their operation make up the major items in cargo shipments to and from Alaska. In some years more than nine-tenths of all Alaska freight shipments have been related to the fisheries. The industry, however, draws on Alaska for only about half of its labor. Operators point out that this is unavoidable, because of the sparse local population in most places and the highly seasonal nature of the business. . . . Seasonal employment is given to more than 20,000 persons."

We shall have occasion later in this opinion to point out that without regard to whether this movement in commerce be denominated "interstate" or "state-to-territory" commerce, the limitations on the Territory's power to regulate it are not in any substantial respect different from those applicable to a State. We proceed therefore to consider the validity of such a law if Alaska were a State.

That in such case the movement of these fishermen into Alaska would constitute interstate commerce is elementary. As stated by Mr. Justice Stone in *Colgate v. Harvey*, 296 U. S. 404, 444: "This Court has many times pointed out that movements of persons across state boundaries are a part of interstate commerce, subject to the regulation and entitled to the protection of the national government under the commerce clause. *Caminetti v. United States*, 242 U.S. 470; *Hoke v. United States*, 227 U.S. 308; *Mayor of Vidalia v. McNeely*, 274 U.S. 676; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196; cf. *Passenger Cases*, 71 How. 283." In this connection Mr. Justice Stone referred to *Crandall v. State of Nevada* (1867), 6 Wall. 35, in which a Nevada capitation tax on persons leaving the State by railroad or other common carrier was held unconstitutional. He said: "No one could doubt that if the decision had been made at any time after *Railroad Co. v. Maryland*, 21 Wall. 456, 472 (1874), and until the

⁸The quotation is from the dissenting opinion. The opinion from which Mr. Justice Stone dissented has since been overruled in *Madden v. Kentucky*, 309 U.S. 83.

present moment, it would have been rested on the commerce clause."

A more recent statement with respect to the movement of persons across State lines as interstate commerce was made in *Edwards v. California*, 314 U.S. 160, 172, where, referring to Art. I §8 of the Constitution, it was said that "it is settled beyond question that the transportation of persons is commerce within the meaning of that provision."⁹

We cannot avoid the fact that the movement of these better fishermen, upon whom the life of the industry depends, is a part of an established course of business and that their movement is one of established regularity. "In determining what is interstate commerce, courts look to practical considerations and the established course of business." *Foster Packing Co. v. Haydel*, 278 U.S. 1, 10 (citing *Swift and Co. v. U.S.*, 196 U.S. 375, 398; *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 55; *Binderup v. Pathe Exchange*, 263 U.S. 291, 309; *Schafer v. Farmers Grain Co.*, 268 U.S. 189, 198, 200).

⁹*Federal Club v. National League*, 259 U.S. 200, is not to the contrary. There the transportation of the baseball players was a "mere incident" to an exhibition which "would not be called trade or commerce in the commonly accepted use of those words." The decision was based, in part, upon *Hooper v. California*, 155 U.S. 648, which may not have survived *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533. Here, where the annual migration is itself a substantial and vital feature of an important industry, the case bears the same relationship to the *Federal Club* case as *Lemke v. Farmers Grain Co.*, 258 U.S. 50, bears to *Milk Board v. Eisenberg Co.*, 306 U.S. 346.

We also think it obvious that whatever the motive which prompted the Alaska legislature in imposing the discriminatory tax upon the nonresident fishermen, the necessary effect of the discrimination was to discourage, hamper and burden this interstate movement of fishermen.

In dealing with those aspects of the Commerce Clause which make it a limitation upon the power of the State, Mr. Justice Frankfurter, speaking for the court in *Freeman v. Hewit*, 329 U.S. 249, 252, said: "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Morgan v. Virginia*, 328 U.S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history."¹⁰ It cannot be said that the Alaska legislature has any greater freedom in burdening commerce between the States and the Territory than it would have if Alaska were a State.

The reason why the Territorial Legislature is thus limited is not that the Commerce Clause, ex

¹⁰The rationale of this aspect of the Commerce Clause is stated in *Southern Pacific Co. v. Arizona*, supra, at p. 768.

proprio vigore, operates as a constitutional limitation. For so far as the Constitution is concerned, Congress might, we assume, confer upon a territory the power to impose burdens upon commerce between the territory and the States, for Congress may "make all needful rules and regulations" respecting the territories under Art. IV, §3, cl. 2. *Shively v. Bowlby*, 152 U.S. 1, 48. But we cannot conceive that in granting legislative power to the Territorial Legislature it was intended that the power should exceed that possessed by the legislature of a State in dealing with commerce. The words "all rightful subjects of legislation" describing the extent to which the legislative power of the Territory should extend (48 USCA §77), do not include the imposition upon commerce such as that here involved of burdens which a State might not create under like circumstances. "All rightful subjects of legislation" must be held to refer to matters local to Alaska.

A study of a long line of decisions of the Supreme Court ranging from *Welton v. State of Missouri*, 91 U.S. 275, to *Nippert v. Richmond*, 327 U.S. 416, will disclose that the Court has held that State legislation imposing discriminatory taxes which may operate to affect adversely the movement of interstate commerce is prohibited by the Commerce Clause; and that through the many years covered by these cases, the Court has not become any less alert to protect commerce which concerns more States than one, and to see that it should not be impaired by state-enacted discriminations. "The

commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455.

When we consider that the movement of the fishermen themselves constitutes interstate commerce, it is apparent that the problem presented by appellant's contention cannot be disposed of by saying that "the taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce." It is true that the taking of the fish is a local incident, but if the tax in its practical operation has a discriminatory impact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident.

Illustrations of this proposition are found in *Best & Co. v. Maxwell*, *supra*, and in *Nippert v. Richmond*, 327 U.S. 416. In *Best & Co.*, the privilege tax there involved was levied upon one "who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." In the *Nippert* case, the license tax was imposed for "engaging in business as solicitor" within the city. It was there urged that the tax was imposed upon "mere solicitation," which was a "local incident." Of this argument the court said: "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from the transportation or

intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax."

The Nippert case dealt with the impact of a tax upon an out-of-state merchant, as compared with the local one. The fishermen who sell their catches to the canneries are not, in any fundamental sense in any different position than merchants. And of the Richmond taxes upon the latter, the court said in striking them down: "They are discriminatory in favor of the local merchant as against the out-of-state one."

We think that a correct statement of the rule of *Best & Co. v. Maxwell*, *supra*, and *Nippert v. Richmond*, *supra*, is to be found in the opinion of Mr. Justice Reed in *Memphis Gas Co. v. Stone*, 335 U.S. 80, 87, where, in citing those two cases, he said: "But the choice of a local incident for the tax, without more, is not enough. There are always convenient local incidents in every interstate operation. *Nippert v. City of Richmond*, *supra*, at 423. * * * Again, where there is a state exaction for some intrastate privilege that discriminates against interstate commerce, it is invalid even though it is sufficiently disconnected from the commerce to be taxable otherwise." It is therefore no answer to

appellant's contention that the discriminatory tax here involved was imposed upon the fishing.

Many cases have involved State taxes upon "drummers." Such taxes have found condemnation because of the discrimination which results from their "practical operation." Referring to them the court said in *Nippert v. Richmond*, supra (pp. 424-425): "Thus the essence of the distinction taken in the *Berwind-White* case was that the taxes outlawed in the drummer cases in their practical operation worked discriminatorily against interstate commerce to impose upon it a burden, either in fact or by the very threat of its incidence, which they did not place upon competing local business and which the New York sales tax did not create. See *Best & Co. v. Maxwell*; 311 U.S. 454; cf. *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359. As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden. For, though 'interstate business must pay its way,' a State consistently with the commerce clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers in giving the power 'To regulate Commerce with foreign Nations, and among the several States * * *'. Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect."

It would appear to be immaterial what purpose was sought to be served by the tax here under

attack, whether to curtail the competition from outside fishermen in the interest of the local ones,¹¹ or simply to produce more revenue.¹² The promotion of such local objectives may not be accomplished by burdens upon interstate commerce. [*Baldwin v. Seelig*, 294 U.S. 511]. "laid repeated emphasis upon the principle that the State may not promote its own economic advantages by curtailment or burdening of interstate commerce." *Hood & Sons v. Du Mond*, 336 U.S. 525, 532. Cf. *Foster Packing Co. v. Haydel*, *supra* (278 U.S. at 13); *Toomer v. Witsell*, *supra* (334 U.S. at p. 403).

The right of the Territory to impose taxes upon the property used in this commerce or upon sundry aspects of the enterprise, including the business or occupation of fishing, cannot be questioned. It has always been held that "interstate business must pay its way." (*Nippert v. Richmond*, *supra*, p. 425, note 14.) It may be required to pull its own weight in the State's internal economy. *Western Live Stock v.*

¹¹Denison, "Alaska Today," (*supra*, note 7), p. 168: "The mass movement of these employees from Puget Sound and from San Francisco has been fine for the boat lines and West Coast labor unions, but has done more to retard permanent growth of population in Alaska than any other cause."

¹²Denison, "Alaska Today," *supra*, p. 174: "Cod fishing on the continental shelf off Alaska's shores is undertaken mostly by fishermen from San Francisco or Puget Sound. If Alaska had a license fee from this and other forms of gratuitous fishing in its waters, the Territory would gain considerable additional revenue; * * *

Bureau, 303 U.S. 250, 253. Such nondiscriminatory taxes on the fisheries industry were upheld in *Pacific Fisheries v. Alaska*, 269 U.S. 269, and *Alaska Fish, etc., Co. v. Smith*, 255 U.S. 44.

But if the tax be laid in such fashion as to discriminate against interstate commerce, it must be denounced as a burden on such commerce, and an enactment of such character is not to be permitted to the local legislature.

We must next determine the bearing upon this situation of certain decisions of the Supreme Court and of this court, some of which were cited in the opinion of the trial court. That court mainly relied upon *Toomer v. Witsell*, *supra*, as authority for its conclusion that the tax established by the Alaska statute did not burden interstate commerce. In that case the Supreme Court had occasion to deal with three separate taxes, under three different sections of a South Carolina statute relating to shrimp fishing. Section 3374, which imposed a tax of one-eighth cent a pound on green shrimp, the court upheld as not a burden upon interstate commerce. It was in connection with this tax, which finds no counterpart in the Alaska statute, that the court said: "It does not discriminate against interstate commerce in shrimp and the taxable event, the taking of shrimp, occurs before the shrimp can be said to have entered the flow of interstate commerce." The opinion of the trial court here alludes to this language, which obviously has nothing to do with any problem similar to the one we are here considering.

Another portion of the South Carolina Act, §3414, which required owners of shrimp boats fishing in the maritime belt off South Carolina to dock at a South Carolina port to unload, pack, and stamp their catch before shipping it to another state, the court held to be a burden on interstate commerce in violation of the Commerce Clause. Section 3379, which imposed a discriminatory license tax on non-residents of South Carolina was attacked upon the ground that the statute was said to violate the privileges and immunities clause of Article IV, §2, and the equal protection clause of the Fourteenth Amendment. Since the court sustained the contention that the section violated Article IV, §2, it had no occasion to say anything as to whether the same section was also void under the commerce clause. However, Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Rutledge in concurring opinions expressed the view that the discriminatory license tax was void under the Commerce Clause.

In *Haavik v. Alaska Packers Assn.*, 263 U.S. 510, the court held valid a Territorial act which imposed an annual license tax of \$5.00 upon nonresident fishermen, although none was imposed upon resident fishermen. The court said (p. 515): "We are not here concerned with taxation by a State. The license tax cannot be said to conflict with §2, Art. IV, of the Constitution—'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' It applies only to nonresident fishermen; citizens of every State are treated alike. Only residents of the Territory are

preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence, and upon whose efforts the future development of the Territory must largely depend."

In *Freeman v. Smith*, 44 F. 2d 703, and 62 F. 2d 291, this court held void an Alaska statute which exacted \$250 annually for a fishing license from nonresidents, while residents were charged but \$1.00. The decision was in large part predicated upon the provisions of the Act of Congress of June 6, 1924, 43 Stat. 464, known as the White Act, which delegated to the Secretary of Commerce the power to set apart and reserve fishing areas in the waters of Alaska, to establish rules regulating the taking of fish therein, and providing "That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce." (48 USCA, §222.)

It was held that the Territorial provision for such licenses was in conflict with this Act of Congress and it was said that even if it were to appear that a fisherman might catch fish to the value of \$3,000 during one season the \$250 license fee was

an unreasonable infringement upon his right to fish thus granted by Congress.

In *Anderson v. Smith*, 71 F. 2d 493, this court upheld an Alaska statute exacting an annual license fee of \$25 from nonresident fishermen and which fixed the license fee of resident fishermen at \$1.00. In that case the court alluded to the Act of June 6, 1924, upon which its decisions in the *Freeman* case had been based, and noted that the same Act contained a proviso that "Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45 and 67 to 90 of this Title." (Title 48 USCA, §228.) This court then said (p. 495): "The question involved here, then, is not the power of the Legislature to discriminate between residents and nonresidents, but the question is whether or not the license fee imposed by the Territorial Legislature is an unreasonable interference with a right granted by Congress, and, therefore, impliedly prohibited by Congress. It is clear then that so long as the license tax imposed by the Territorial Legislature upon the citizens of the United States who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with, the exercise of the right granted by Congress, it is within the power of the Territorial Legislature. We cannot say that the license fee

imposed by Territorial Legislature in 1933 and now under attack is so unreasonable as to conflict with the Act of Congress granting the right to fish."

In the *Haavik* case, *supra*, the specific problem dealt with by the court was the application of §2 of Article IV of the Constitution—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And because the record there did not disclose the facts here involved, namely, the regular and extensive transportation of fishermen to and from the Territory, it cannot be said that the question here presented even lurked in that record, or was passed upon in that case.

The decision of this court in *Anderson v. Smith*, *supra*, had no occasion to deal with any problem related to interstate commerce, for no such issue was there involved. The only question determined was whether the license fee was so exorbitant as to prohibit the fishing which Congress had permitted.

We are of the opinion that the question here involved has not previously been determined in any case which has been called to our attention.

We note that the discrimination here attacked cannot find any justification in the doctrine of *McCready v. Virginia*, 94 U.S. 391, which proceeded upon the theory of the State's ownership of fish and game. If it can be said that that case retains any authority after what was said of it in *Toomer v. Witsell*, 334 U.S. 388, 400, and in *Takahashi v. Fish Comm'n.*, 334 U.S. 410, 420, it has no application here, for the Act of Congress of June 6, 1924.

referred to above, and §3 of the Organic Act (Title 48 USCA, §24),^{12a} definitely negatives both Territorial proprietorship, and Territorial power to regulate fisheries. See *P. E. Harris & Co. v. Mullaney*, 87 F. Supp. 248.

We find in the record no facts which would operate to sustain the discrimination here effected. The trial court found that it could be upheld on account of the additional costs of enforcing the Act and collecting the tax in respect to the nonresident fishermen. If this were a problem arising from a discrimination in a field wherein the Territory had power to legislate, and where the discrimination was attacked as a denial of equal protection of the law, the factor of additional cost would be important and that might justify the classification. Such a case was *Madden v. Kentucky*, 309 U.S. 83. But the effort to impose a discriminatory burden upon the movement of the nonresident fishermen took the Territorial Legislature into an area where it had no power to proceed. It was trespassing into a forbidden field. The existence of the discrimination demonstrates the invalidity of the enactment and overcomes any presumption of validity which might otherwise attach to the Act.

The narrow limits within which the Supreme Court has compelled State legislatures to operate in imposing taxes, which in some measure operate as a burden upon interstate commerce, serve to

^{12a} "The authority granted to the legislature * * * shall not extend to * * * the game, fish, and fur seal laws * * * applicable to Alaska."

demonstrate the complete want of justification for the discrimination here imposed.

It is well settled that the States may impose burdens upon commerce entering their borders in connection with their inspection laws. But fees imposed under such inspection laws have been sustained only when their amount fairly represents the cost of the inspection. *Gt. Northern Ry. v. Washington*; 300 U.S. 154. The State may not add to the inspection fees amounts required by the State in order to police the enforcement of the law. *Foote v. Maryland*, 232 U.S. 494.¹³

The fact that taxes and charges imposed in excess of those permissible limits are prohibited to the States in connection with their inspection laws demonstrates that a fortiori the discriminatory tax here cannot be sustained. The Act had none of the aspects of an inspection law, and the burdensome charges here imposed are even less justifiable than those held bad in the cases just cited.

The trial court's findings with respect to the difficulties and the cost of enforcement of the collection of the license taxes from nonresident fishermen may well have been directed to an inquiry into those matters which the court in *Toomer v. Witsell*, *supra*, indicated might justify some discrimination in license fees charged resident and nonresident fishermen. In that case, in considering whether the dis-

¹³In this case, and the *Grt. Northern Ry.* case, *supra*, it was said the burden was upon the State to demonstrate that the fees did not exceed these permissible limits.

crimination by South Carolina with respect to license fees for shrimp boats owned by residents and for those owned by nonresidents were in violation of Article IV, §2, relating to the privileges and immunities of citizens of the several States, the court, after finding no reason sufficient to justify the discrimination, concluded by saying (p. 398):

“Nothing in the record indicates that nonresidents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State’s general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by noncitizens, as a class, and the severe discrimination practiced upon them.”

The trial court apparently was of the opinion that the validity of the Act here in question must be judged by the standards applied in *Toomer v. Witsell*. We find it unnecessary here to consider whether the limitations of the Privileges and Im-

munities Clause of Article IV, §2, are applicable to the facts of this case, for as we have indicated, we think that the tax here in question imposes a burden upon commerce between the States and the Territory in such manner that, if Alaska were a State the tax would be void and unenforceable. And because it cannot be said that the Territorial Legislature has any greater power to impose a burden upon such commerce than might be exercised by that of the State, we must conclude that so much of the tax as exceeds that charged resident fishermen is void.

Appellants have argued that §3 of the Organic Act for Alaska, which provides that the Constitution of the United States "shall have the same force and effect within said Territory as elsewhere in the United States" (28 USCA, §23), operated to make the Territorial Legislature subject to the requirements of Article IV, §2, of the Constitution: "The citizens of each State shall be entitled to all Privileges and Immunities of the citizens of the several States." It is said that this provision controls Alaska legislation in the same manner in which it controls the legislation of any State. It is argued therefore that the discriminatory license tax is void for the reasons stated in the Toomer case.

If that premise be sound, a matter upon which we are not required to pass, it must be admitted that the findings of the court and the facts in the record would not be sufficient to measure up to the tests laid down in the Toomer case where it was said (p. 398): "The State is not without power,

* * * to charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." (Emphasis added.) For here, while the findings were that "90% of the cost * * * is incurred in collecting or attempting to collect said taxes from nonresident fishermen," the record is barren of evidence of what this 90% amounted to. The \$45.00 differential on the 3,200 nonresident fishermen of the plaintiff Union alone would produce \$144,000. It may be inferred from the record that the differential collected from all nonresident fishermen would be not less than twice that amount. The added enforcement cost shown in the record is only a minor fraction of the amount collected, and since such a discrimination by a State need not be exclusionary in amount to be in violation of Article IV, §2, *Chalker v. Birmingham & N.W. Ry. Co.*, 249 U.S. 522; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, we would be inclined to consider the discriminatory legislation here also in violation of Article IV, §2, as extended to Alaska by §3 of the Organic Act, were it not for the holding in *Haavik v. Alaska Packers Assn.*, *supra*, that Article IV, §2, had no application to Alaska. There the court made specific reference to §3 of the Organic Act, but apparently assumed without discussion that it did not operate to make Article IV, §2, applicable to Alaska. In *Duncan v. Kahanamoku*, 327 U.S. 304, 317, the court expressly held that §5 of the Hawaiian Organic Act, which is identical with §3 of the

Alaska Organic Act, operated to extend certain constitutional provisions to the Territory of Hawaii.

Whether at some future time the Supreme Court will give a like effect to §3 of the Alaskan Organic Act, as it failed to do in the Haavik case, we are not here called upon to speculate.

Judgment is reversed, with instructions to enter judgment in accordance with this opinion.

Denman, Chief Judge, dissenting:

I dissent.

(A) Because the gravamen of the court's opinion is that the Territory of Alaska has no more power over taxation than if it were a State. This is in square conflict with Haavik v. Alaska Packers Association, 263 U.S. 510, which held valid an Alaska license tax on nonresident fishermen not imposed on resident fishermen.

The ground of the Haavik decision is that the Territory of Alaska has the same power of taxation that Congress has. In that case Haavik, "while residing in California * * * was employed by the appellee corporation, owner and operator, to serve as seaman and fisherman on the sailing vessel 'Star of Finland.' He sailed upon her to Alaska and served with her there while she engaged in fishing from the middle of May, 1921, until the middle of September." That is to say, the fisherman upon whom the license fee was imposed, was carried by his employer into commerce between the state and the territory and fished while in the territory for

his employer. Haavik was more certainly in interstate commerce than the fishermen in the instant case, of whom there is proof that the vast body of them were transported to Alaska by employers to be there employed by the employers in fishing.

In this situation the Supreme Court held that the territory had the same power of taxation as Congress itself, as follows:

"Plainly, we think, the Territorial Legislature had authority under the terms of the Organic Act to impose both the head and the license tax unless, for want of power, Congress itself could not have laid them by direct action. Talbott v. Silver Bow County, 139 U.S. 438, 448; Binns v. United States, 194 U.S. 486, 491; Alaska Pacific Fisheries v. United States, 248 U.S. 78, 87; Territory of Alaska v. Troy, 258 U.S. 101."

Continuing in the opinion, it reiterates that "We are not here concerned with taxation by a state." Because it was not taxation by a state but by a territory with Congressional power over taxation, the court holds:

"The license tax cannot be said to conflict with §2, Art. IV, of the Constitution — 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' It applies only to nonresident fishermen; citizens of every State are treated alike. Only residents of the Territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution

which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend. See *Alaska Pacific Fisheries v. United States* [248 U.S. 78; 87], and *Alaska Fish Co. v. Smith*, 255 U.S. 44, 47, 48." (Emphasis supplied.)

In support of its decision that the territory has the same power of taxation as Congress, the court cites the case of *Territory of Alaska v. Troy*, 258 U.S. 101. This case involved the Merchant Marine Act of June 5, 1920, requiring merchandise transported by water to move in vessels built in and documented under the laws of the United States and owned by United States citizens. Alaska was excluded from the limitations. The court held, *inter alia*, that the legislation did not violate §8, Article I, of the Constitution, which provides that "All duties, imposts and excises shall be uniform throughout the United States." Of this, the Supreme Court stated, "The questioned regulation relates directly to commerce and clearly is not within the usual meaning of the words of §8, Art. I, of the Constitution." (Emphasis supplied.) It held that, because Alaska was a territory and not a state, Congress had the power to make such a regulation of commerce.

Incidentally, the official report of the *Haavik* case shows that the appellant contended that the license tax of \$5 was invalid because "Alaska permits any one to take salmon for any purpose, but discrimi-

nates between residents and nonresidents in a matter in which interstate commerce alone is involved," on which the court held that "none of the points relied upon by appellant is well taken. The decree below must be affirmed." In view of the Supreme Court's reliance on *Territory of Alaska v. Troy*, supra, involving interstate commerce, this court's position that the Supreme Court did not consider the interstate factor in the *Haavik* case is clearly untenable.

I further dissent:

(B) Because the court's opinion fails to apply to a territory's legislation the many cases holding the presumption of constitutionality of its license tax and because of its failure to recognize that the attacking fishermen have not maintained their burden of proof that the fee of \$50 per year for the protection of its laws for nonresident fishermen is arbitrary or excessive.

It has long been established that there is a presumption against the attacking party that an assailed statute is constitutional. Supported by a long line of decisions, the Supreme Court in the recent case of *Davis v. Department of Labor*, 317 U.S. 249, speaks of its heavy reliance upon the presumption, stating at page 257:

"The problem here is comparable to that in another field of constitutional law in which courts are called upon to determine whether particular state acts unduly burden interstate commerce. In making the factual judgment there,

we have relied heavily on the presumption of constitutionality in favor of the state statute.”
(Emphasis supplied.)

Likewise it has long been established that in an attack on a state taxing statute the burden of proof is on the attacking party. *Tax Commissioners v. Jackson*, 283 U.S. 527.¹⁴ Basing their decision on fourteen prior decisions, the Supreme Court, in *Metropolitan Co. v. Brownell*, 294 U.S. 580, 582, states the rule with respect to attacks on a statute as violating the equal protection clause of the Fourteenth Amendment and the reasons underlying it as follows:

“It is a salutary principle of judicial decisions, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that ~~the~~ classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.”
(Emphasis supplied.)

In accord with the “assumption that the classi-

¹⁴Recently restated by the Supreme Court in *Norton Co. v. Department of Revenue*, 340 U.S. 534.

fication rests upon some rational basis within the knowledge and experience" of the Alaska legislature, we held in *Anderson v. Smith*, 71 F. 2d 493, 495, that a license fee of \$25 per annum on non-resident fishermen was not arbitrary or unreasonable, even though the resident fishermen's license fee was only \$1 per annum. On this we accepted the theory of the *Haavik* case, which at page 515 gives as a ground of legislative classification by which the license fee was charged to nonresidents and not to residents, the development of this remote frontier territory by its permanent residents.

These fishermen engaged in catching fish well could be "conceived" by the Alaska legislature as escaping all the various Alaska taxations of residents for municipalities and school districts and otherwise and likewise they are not being subject to the increased cost of living caused by the license taxes on many enterprises which increase the cost of services and goods of all kinds for which the residents are required to pay. Certainly appellants have not sustained their burden of proof that they are subject to other forms of taxation and its effect on the cost of living of residents. Nor has the burden of proof been maintained that there has been any change in the peculiar conditions existing in Alaska in 1924 as distinguished from the economically developed states warranting a classification of nonresidents from residents, of which the Supreme Court said in the *Haavik* case that the license tax "applies only to nonresident fishermen; citizens of every State are treated alike. Only resi-

dents of the Territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring those who have acquired a local residence and upon whose efforts the future development of the Territory must largely depend." (Emphasis supplied.)

The question then is whether the increase of the license for the benefit of the Alaska government to nonresident fishermen from the \$25 of *Anderson v. Smith*, *supra*, to the present \$50, is so great that it makes the larger amount unconstitutionally excessive.

The law creating the \$25 fee was enacted in 1933; that herefor \$50 in 1949. This court has repeatedly taken judicial notice of the enormously increased costs of all kinds in the last decades. *Southern Pacific Co. v. Zehnle*, 163 F. 2d 453, 454. Cf. Annotation 12 A.L.R. (2d) 611. In 1933 when the non-resident fee was fixed at \$25 the country was in the grip of the great depression, wages were low and the National Recovery and Gold Demonetization acts were passed to increase prices. In this sixteen years between then and 1949 was the second world war, with the great and now remaining rise in prices and rents which led to federal legislation to hold them from further rise. The cold war prevailing in 1949 well could have been considered by the Alaska legislature as no restraint on their increase.

Not only were all the costs of Alaskan government greatly increased, but the same is true of the costs of collection from the hundreds, if not thou-

sands, of evading nonresident fishermen hiding from the tax collector and the prosecution of the offenders as shown by the evidence adduced at the trial. Of the increased costs of collection, it is not necessary to show that they equalled the amount collected, for there is presumed to be an excess of collections over cost to constitute territorial income for its governmental services rendered to and available to the nonresidents, held a valid purpose in the Haavik and Anderson cases.

(C) I dissent further from the failure to construe Section 41 of the Civil Rights Act, upon which appellants rely here:

The section of the Civil Rights Act here invoked, 8 USCA, §41, reads:

“§41. Equal rights under the law. .

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like * * * licenses * * * and to no other. R.S. §1977.” (Emphasis supplied.)

The words “white citizens” have been interpreted as giving this equal protection to citizens and aliens of all races. So interpreted, the Act means that “All persons [of all races] within the jurisdiction of the United States shall have the same right * * * to the full and equal benefit of all laws * * * as is

enjoyed by white citizens, and shall be subject to like * * * licenses * * * of every kind [as those imposed on white citizens], and no other." (Emphasis supplied.)

Gf. *Collins v. Hardiman*, ... U.S. ...; where the court construed the conspiracy clause of the Act as not applying to the civil rights interfered with by "a lawless political brawl, precipitated by a handful of white citizens against other white citizens," after stating the purpose of the Act is "to put the lately freed Negro on an equal footing before the law with his former master."

The judgment should have been affirmed.

[Endorsed]: Opinion and Dissenting Opinion.
Filed June 25, 1951. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 12586

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Appellant,

vs.

M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,

Appellee.

JUDGMENT

Appeal from the District Court for the Territory
of Alaska, Division Number One.

This Cause came on to be heard on the Transcript
of the Record from the District Court for the Ter-
ritory of Alaska, Division Number One, and was
duly submitted.

On Consideration Whereof, It is now here ordered
and adjudged by this Court, that the judgment of
the said District Court in this Cause be, and hereby
is, reversed, with costs in favor of the appellants
and against the appellee, and that this cause be, and
hereby is, remanded to the said District Court with
instructions to enter judgment in accordance with
the opinion of this Court.

It is further ordered and adjudged by this Court
that the appellants recover against the appellee for
their costs herein expended, and have execution
therefor.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF
APPEALS FOR THE NINTH CIRCUIT,
TO RECORD CERTIFIED UNDER RULE
38 OF THE REVISED RULES OF THE
SUPREME COURT OF THE UNITED
STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 196 pages, numbered from and including 1 to and including 196, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of August, 1951.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 329

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 5, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8683)

Office Supreme Court, U. S.

FILED

SEP 17 1951

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1951

No. 329

M. P. MULLANEY, Commissioner of Taxa-
tion of the Territory of Alaska,

Petitioner,

vs.

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit.

J. GERALD WILLIAMS,
Attorney General of Alaska,

JOHN H. DIMOND,
Assistant Attorney General,

HAROLD J. BUTCHER,
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Anchorage, Alaska,
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Subject Index

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Specifications of error to be urged	5
Reasons for granting the writ	6
Conclusion	13
Appendix	i

Table of Authorities Cited

Cases	Pages
Alaska Fish Company v. Smith, 255 U. S. 44.....	12
Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 52, certiorari denied, 242 U. S. 648	12
Anderson v. Smith, 71 F. 2d 493	9
Buschaglia v. Ballester, 162 F. 2d 805, certiorari denied, 332 U. S. 816	8
Colgate v. Harvey, 296 U. S. 404	10
Davis v. Department of Labor, 317 U. S. 249	10
Haavick v. Alaska Packers' Association, 263 U. S. 510...4, 6, 7, 8	
Interstate Busses Corp. v. Blodgett, 276 U. S. 245	10
Madden v. Kentucky, 309 U. S. 83	10
Neild v. District of Columbia, 110 F. 2d 246.....	7
Norton Company v. Department of Revenue, 340 U. S. 534	10
Pacific American Fisheries v. Territory of Alaska, 269 U. S. 269	12
Toomer v. Witsell, 334 U. S. 385.....	5

Statutes

Chapter 66, Session Laws of Alaska 1949.....	passim
Civil Rights Act (R.S. Section 1977, 8 USCA Section 41)...	5, 6
Alaska Organic Act, Section 3 (Act Aug. 24, 1912, c. 387, Section 3, 37 Stat. 512, 48 USCA Section 24)	12
Act June 6, 1924, c. 272, Section 8, 43 Stat. 467, 48 USCA Section 228	12

In the Supreme Court
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vs.

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit.

*To the Honorable Fred M. Vinson, Chief Justice of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

The Attorney General of Alaska on behalf of M. P.
Mullaney, Commissioner of Taxation of the Territory

of Alaska, prays that a writ of certiorari issue to review the judgment entered in this case on June 25, 1951, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the district court is reported at 91 F. Supp. 907. The opinion of the court of appeals, as yet unreported, will be found at R. 162.

JURISDICTION.

The judgment of the court of appeals was entered on June 25, 1951 (R. 196). The jurisdiction of this Court is invoked under Section 1254 of the new Federal Judicial Code.

QUESTION PRESENTED.

Whether the Territory of Alaska has the power to impose on nonresident fishermen a \$50 license tax when resident fishermen are required to pay \$5.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, *infra*, pp. i-iii.

STATEMENT.

Chapter 66, Session Laws of Alaska 1949 (enacted March 21, 1949), requires all commercial fishermen who take fish from the fishery resources of Alaska to obtain an annual license from the territorial Tax Commissioner. For such license the fee charged a non-resident fisherman is \$50; that charged a resident is \$5. On May 26, 1949 this action, seeking a declaration from the court that Chapter 66 is unconstitutional and invalid insofar as it imposes a higher license fee on nonresidents than on residents and praying for an injunction to restrain the Tax Commissioner from making collection of the nonresident tax, was brought by Oscar Anderson, Secretary-Treasurer of the respondent Union, and the Alaska Fishermen's Union off behalf of some 3200 of its members who are non-residents and who fish in Alaska each year (R. 2-6).

At the trial in the district court on March 16, 1950 (R. 46) petitioner introduced testimony which showed, among other things, that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen; that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents

4

than with respect to the resident fishermen (R. 95-120). No attempt was made by respondents to contradict the testimony from which such findings were made. The district court consequently held that there were sufficient differences between resident and non-resident fishermen to justify the classification in the amount of license fees between the two, sustained the validity of Chapter 66, and ordered that the complaint be dismissed (R. 14-24).

On appeal the court below (with Chief Judge Denman dissenting) reversed the district court, holding (1) that the movement of nonresident fishermen each year into Alaska constitutes interstate commerce (R. 169); (2) that the necessary effect of the imposition of a higher tax on the nonresidents was to discourage, hamper, and burden such commerce (R. 171); (3) that no facts appeared in the record to sustain the discrimination, and moreover, that the existence of the discrimination by itself demonstrated its invalidity and overcame any presumption of validity which might otherwise attach to Chapter 66 (R. 182); (4) that the Territory had no power over taxation different from that possessed by a state, and hence had no greater freedom in burdening commerce between the states and the Territory than it would if Alaska were a state (R. 169, 171-172); and (5) that (for the foregoing reasons) so much of the tax under Chapter 66 as exceeds that charged resident fishermen is void (R. 185). By way of dictum, the court also stated that if it were not for *Haavick v. Alaska Packers' Association*, 263 U.S. 510, it would be obliged to find that

the facts in the record would not be sufficient (under its interpretation of *Toomer v. Witsell*, 334 U.S. 385) to justify the differential in the tax, and that the discrimination would be, therefore, also in violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution (R. 185-186). In argument in the court below, respondents also relied upon the application of Section 41 of the Civil Rights Act (8 USCA §41) to the legislation in question, but the court failed to construe this statute (R. 194).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding that Chapter 66, in imposing on non-resident fishermen a higher license fee than that exacted from resident fishermen, constitutes an unconstitutional burden on and discriminates against interstate commerce.

2. In holding that the Territory of Alaska has no more power over taxation than if it were a state, and hence, that the Territory, in enacting tax laws, is limited to the same extent as a state by the commerce clause of Article I, § 8, of the federal Constitution.

3. In failing to recognize—in view of the record of this case—the presumption that Chapter 66 is constitutional, and in failing to require respondents to maintain their burden of proof that the \$50 tax is unreasonable, arbitrary or excessive.

4. In holding that if it were not for *Haavick v. Alaska Packers' Association*, 263 U.S. 510, the differential in tax between nonresidents and residents would constitute a violation of the privileges and immunities clause of Article IV, § 2, of the federal Constitution.

5. In failing to construe Section 41 of the Civil Rights Act (8 USCA § 41).

REASONS FOR GRANTING THE WRIT.

1. The decision below, in being based upon the theory that the power of the Territory to tax is in no respect different from that of a state, is in direct conflict with *Haavick v. Alaska Packers' Association*, 263 U.S. 510. In that case a 1919 act of the territorial legislature which imposed a \$5 license tax on non-resident fishermen and none on residents was attacked by Haavick, a nonresident fisherman, who was employed by appellee corporation as a seaman on a vessel which engaged in fishing in the Territory. One ground of attack was that the act violated the privileges and immunities clause of Article IV, § 2 of the Constitution of the United States. Faced with this contention, this Court held that the Territory had the same power over taxation as Congress, that it was not in this case concerned with taxation by a state, and, for these reasons, that the license tax did not violate the privileges and immunities clause and that it could " * * find nothing in the Constitution which prohibits Congress from favoring those who have ac-

quired a local residence and upon whose efforts the future development of the Territory must largely depend." (Emphasis supplied). This, then, is a clear and express declaration by this Court that the territorial legislature is not bound by the same limitations in enacting tax laws as is a state.

If then, for the reasons stated in the *Haavick* case (*supra*), the privileges and immunities clause is no bar to the imposition by the territorial legislature of a higher license tax on nonresident fishermen, it follows that the commerce clause of Article I, § 8 of the Constitution does not prohibit this type of legislation. Congress itself could have done this by direct action, since the commerce clause, conferring as it does exclusive jurisdiction on Congress to regulate commerce among the states, operates as a limitation solely upon the states and is no bar to action by Congress in any event. See *Neild v. District of Columbia*, 110 F. 2d 246, 251 (App. D.C.). Hence, if the commerce clause would constitute no bar to action by Congress, it cannot have the effect of limiting territorial action. It is not a fact then, as the court below has stated, that Congress in granting legislative power to the Territory intended that such power should not exceed that possessed by the states in dealing with commerce (R. 169, 171-172).

Nor is the court below correct in stating that the interstate factor involved here was not involved in the *Haavick* case (R. 181). One of the points relied on by appellants there, as it appears from the official record of the case on page 511, was that "Alaska per-

mits anyone to take salmon for any purpose, but *discriminates between residents and nonresidents in a matter in which commerce alone is involved*" (Emphasis supplied). To this the court replied (p. 515): "None of the points relied upon by appellant is well taken * * *" We submit, therefore, that in view of the decision in the *Haavick* case there was no authority for the court below to hold that the tax imposed on nonresident fishermen under Chapter 66 was an unconstitutional discrimination against interstate commerce.

2. The decision below, insofar as it applies the limitations of the commerce clause to territorial legislation, is also in conflict with *Buscaglia v. Ballester*, 162 F. 2d 805 (1st Cir.), cert. denied 332 U. S. 816. There, in reply to the assertion that the subjection of certain property to the Puerto Rico ad valorem tax law violated the commerce clause, the court held that this clause did not have the effect of limiting territorial action. It is submitted that the reasoning of that court is sound and should be equally applicable where the "territorial action" is that of the legislature of Alaska. Congress has the power under Article IV, § 3, Clause 2 of the Constitution to legislate with respect to territories, and this comprehensive power is not enhanced by the commerce clause of the Constitution. Moreover, since Congress can limit territorial action to any extent it chooses—it having reserved the express power to annul any act of the legislature of the Territory of Alaska (37 Stat. 518, 48 USCA § 90)—the commerce clause cannot have the consequential effect of limiting such territorial action.

3. The decision of the court below is in direct conflict with a decision of the same circuit in *Anderson v. Smith*, 71 F. 2d 493. In that case the appellant, a resident of San Francisco who fished in Alaska, attacked the validity of a territorial license tax which imposed a \$25 fee on nonresident fishermen and a \$1 fee on residents. This same court then said (p. 494):

"It is clear then that by section 3 of the Organic Act Congress authorized the territorial Legislature to determine what additional license fees should be paid for the privilege of fishing within the territorial waters of Alaska, *and to discriminate between residents and nonresidents in that regard.* * * *" (Emphasis supplied).

There has been no subsequent action by Congress, of which petitioner is aware, revoking the authority thus granted to the Alaska legislature to discriminate between residents and nonresidents with respect to fishermen's license taxes. The power then still exists, and as pointed out above in Point 2 of this petition, it is not barred or limited by the commerce clause. Consequently, the court below, in attempting to distinguish these two cases on the ground that the problem relating to interstate commerce was not involved in *Anderson v. Smith*, supra, (R. 181), has completely failed to recognize and resolve the real conflict that exists between the two cases.

4. Even if the commerce clause were a limitation on the taxing power of the Territory, the decision of the court below that the \$50 nonresident tax unconstitutionally discriminates against interstate commerce is in conflict with applicable decisions of this Court.

Petitioner has clearly demonstrated that the inconvenience, burden and expense in collecting the tax from nonresident fishermen is substantially greater than that imposed upon him in collecting the tax from the residents (R. 95-120). Respondents made no attempt to contradict this showing. Consequently, even though it might originally have been held that on the face of the statute the classification between residents and nonresidents was not based upon a difference having a fair or substantial relation to the object of the act (see *Colgate v. Harvey*, 296 U. S. 404, 424), this could no longer be said to be the case once petitioner had made the showing he did. Under this evidence, a presumption was immediately raised that the legislative scheme of achieving an equitable distribution of the burden of government was constitutional—a presumption which, at least as far as equal protection is concerned, could be overcome only by the most explicit demonstration that the classification was a hostile or oppressive discrimination against the nonresident fishermen. *Madden v. Kentucky*, 309 U. S. 83, 88. But it is not only in cases where equal protection of the laws is involved that this rule of law applies, for the presumption also attaches in cases where acts of state legislatures are alleged to unduly burden interstate commerce. *Davis v. Department of Labor*, 317 U. S. 249, 257. In these latter cases, as well as in the former, the burden is cast upon one who attacks a statute to overcome the presumption of its validity. *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, 251. Cf. *Norton Company v. Department of Revenue*, 340 U. S. 534.

Here the court below had no basis on which to find that the \$50 tax, in actuality, fell with disproportionate economic weight on interstate commerce—in the absence of any showing by respondents that no additional burden was cast upon the Tax Commissioner in collecting the tax from the nonresidents, that such nonresidents do not escape the various taxes imposed by municipalities and school districts in the Territory to which residents are subject, or that nonresidents are subject, to the same extent as residents, to the substantial increased living costs which are so prevalent in the Territory. The record discloses that respondents made no such showing. It is submitted, therefore, that the holding by the court below that “The existence of the discrimination demonstrates the invalidity of the enactment and overcomes any presumption of validity which otherwise might attach to the Act” (R. 182) is clearly at variance with applicable decisions of this Court.

5. The decision below constitutes a grave interference with the legitimate exercise of the power of taxation of the territorial legislature. As the court below pointed out, the fisheries of Alaska are the backbone of the Territory's economy—in fact more than one half of the entire revenue of the Territory comes from this one source (R. 168). Congress, however, gave express recognition to this fact many years ago. In 1912, when Congress established the Organic Act for Alaska, it was provided in Section 3 of that Act that although the Territory should not have the authority to regulate the fisheries, this prohibition “shall not operate to prevent the legislature from

imposing other and additional taxes and licenses." (Act Aug. 24, 1912, c. 387, § 3, 37 Stat. 512, 48 USCA § 24.) In 1916, the Court of Appeals for the Ninth Circuit pointed out in *Alaska Pacific Fisheries v. Territory of Alaska*, 236 Fed. 52, at p. 58, that the business of fishing was the main subject for consideration by Congress in the question of future taxation by the Territory. In the Act of June 6, 1924 Congress reaffirmed its intent in this respect. There, after making comprehensive provisions for the regulation of the fisheries of Alaska, the law stated: "Nothing in Sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title." (June 6, 1924, c. 272, § 8, 43 Stat. 467, 48 USCA § 228.) Moreover, this Court has held that such power of taxation, with respect to the fisheries, is "express and unlimited * * *", *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, and an "unlimited power expressly given * * *", *Pacific American Fisheries v. Territory of Alaska*, 269 U. S. 269, 277.

The court below, however, in holding that the territorial legislature has entered into an area in which it had no power to proceed (R. 182), has established a decision which, if not reviewed by this Court, will have the necessary effect of narrowly limiting the territory's acknowledged and unlimited power of taxation, and of hampering and defeating clearly

expressed Congressional objectives. To restrict the amount of tax that can be collected from the non-resident fishermen to the amount charged residents, in the face of the uncontradicted proof that almost insuperable difficulties and substantially increased costs are placed upon the Territory in collecting the tax from the nonresidents, is to gravely curtail the power of the territorial legislature to obtain revenue, from this phase of fisheries, to which it is entitled. We do not believe it should be assumed that such could have been the intent of Congress in legislating for the Territory, in the absence of a review by this Court of the ruling below.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Dated, September 5, 1951.

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(Appendix Follows.)

Appendix.

Appendix

Chapter 66, Session Laws of Alaska, 1949.

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, \$5.00; non-resident fisherman, \$50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or who

maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

* * * Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

Section 8. Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

*Act Aug. 24, 1912, c. 387, § 3, 37 Stat. 512,
48 USCA § 24.*

The authority granted to the legislature by section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to sections 41, 47, 161 to 169, 321 to 325, and 329 of this chapter. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.

*Act June 6, 1924, c. 272, § 8, 43 Stat. 467,
48 USCA § 228*

Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted to the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title.

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1951

No. 329

M. P. MULLANEY, Commissioner of Taxa-
tion of the Territory of Alaska,

Petitioner,

VS.

OSCAR ANDERSON and ALASKA
FISHERMEN'S UNION,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

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Subject Index

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specifications of error to be urged	5
Summary of argument	6
Argument	17
I. Chapter 66 is valid since the Constitution of the United States does not apply with the same force to the Territory of Alaska as it does to the several States	17
II. Even if the Constitution originally did not have a limited application to Alaska, subsequent congressional acquiescence in a taxing scheme such as that contained in Chapter 66 has constituted a waiver of certain constitutional limitations	27
III. Chapter 66 would be constitutional even if Alaska were a state	35
IV. Chapter 66 does not violate the Civil Rights Act or §9 of the Organic Act of Alaska	46
Conclusion	46
Appendix.	

Table of Authorities Cited

Cases	Pages
Aero Transit Co. v. Georgia Commission, 295 U.S. 285	32
Alaska v. Troy, 258 U.S. 101	6, 7, 19, 20
Alaska Fish Co. v. Smith, 255 U.S. 44	12, 35
Alaska Pacific Fisheries v. Territory of Alaska, 236 F. 52, certiorari denied 242 U.S. 648, writ of error dismissed 249 U.S. 53	11, 31
Alaska Steamship Co. v. Mullaney, 180 F. 2d 805	17, 48
Anderson v. Scholes, 12 Alaska 295, 83 F. Supp. 681	9, 24
Anderson v. Smith, 71 F. 2d 493	11, 12, 32, 33
Bell's Gap Railroad Co. v. Pennsylvania, 134 U.S. 232	16, 45
Bourjois, Inc. v. Chapman, 301 U.S. 183	15, 42, 44
Buscaglia v. Ballester, 162 F. 2d 895, certiorari denied 332 U.S. 816	8, 22
Carmichael v. Southern Coal Co., 301 U.S. 495	32, 39
Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1	28
Cincinnati Soap Co. v. United States, 301 U.S. 308	28
Colgate v. Harvey, 296 U.S. 404	39
Collins v. Hardyman, 341 U.S. 651	47
Davis v. Department of Labor, 317 U.S. 249	42
Detroit Bank v. United States, 317 U.S. 329	26
Downes v. Bidwell, 182 U.S. 244	7, 20, 27, 28
Duehay v. Acacia Mutual Life Insurance Co., 105 F. 2d 768	9, 24, 28
Duncan v. Kahanamoku, 327 U.S. 304	26
Edwards v. California, 314 U.S. 160	15, 44
El Paso & Northeastern Railway Co. v. Gutierrez, 215 U.S. 87	8, 22
Farrington v. Tokushige, 273 U.S. 284	9, 25
Fox v. Standard Oil Co., 294 U.S. 87	48
Freeman v. Hewit, 329 U.S. 249	21
Freeman v. Smith, 44 F. 2d 703 (certiorari denied 282 U.S. 904), and 62 F. 2d 291	31, 33

TABLE OF AUTHORITIES CITED

iii

	Pages
General American Tank Car Corp. v. Day, 270 U.S. 367.....	41
Gregg Dyeing Co. v. Query, 286 U.S. 472.....	43
Haavik v. Alaska Packers' Association, 263 U.S. 510.....	4, 5, 9, 11, 18, 23, 31, 44
Hepburn v. Ellzey, 2 Cranch 445.....	6, 20
Hirabayashi v. United States, 320 U.S. 81.....	9, 26
Howard v. Illinois Central Railroad Co., 207 U.S. 463.....	22
Hurd v. Hodge, 334 U.S. 24.....	17, 48
Ingels v. Morf, 300 U.S. 290.....	42
Inter-Island Steam Navigation Co. v. Hawaii, 305 U.S. 306.....	7, 8, 21, 22, 28
Interstate Busses Corp. v. Blodgett, 276 U.S. 245.....	15, 43
Lake Superior Consolidated Iron Mines v. Lord, 371 U.S. 577.....	48
Lawrence v. State Tax Commission, 286 U.S. 276.....	39, 40
Madden v. Kentucky, 309 U.S. 83.....	13, 39
Martinsen, et al. v. Mullaney, 12 Alaska 455; 85 F. Supp. 76.....	46
Metropolitan Insurance Co. v. Brownell, 294 U.S. 580.....	13, 40
Missouri v. Ross, 299 U.S. 72.....	32
Morgan v. Virginia, 328 U.S. 373.....	8, 21, 22, 27, 29
National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582.....	7, 20, 25, 29
Neild v. District of Columbia, 110 F. 2d 246.....	28
New Orleans v. Winter, 1 Wheat. 91.....	6, 20
Ohio Oil Co. v. Conway, 281 U.S. 146.....	14, 41, 46
Pacific American Fisheries v. Territory of Alaska, 269 U.S. 269.....	11, 12, 31, 35
Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U.S. 403.....	14, 42, 44
Paul v. Virginia, 8 Wall. 168.....	23
Peacock & Co. v. Pratt, 121 F. 772.....	11, 32
Royster Guano Co. v. Virginia, 253 U.S. 412.....	13, 39
Southern Pacific Co. v. Arizona, 325 U.S. 761.....	7, 21
State Railroad Tax Cases, 92 U.S. 575.....	41

	Pages
Steward Machine Co. v. Davis, 89 F. 2d 267, affirmed 301 U.S. 548	28
Takahashi v. Fish & Game Commission, 334 U.S. 410	16, 47
Tax Commissioners v. Jackson, 283 U.S. 527	39, 41
Toomer v. Witsell, 334 U.S. 385	4, 8, 23, 44, 45
Travelers' Insurance Co. v. Connecticut, 185 U.S. 364	41
Truax v. Corrigan, 257 U.S. 312	28, 29, 47
United States v. Elgin, Joliet & Eastern Railway Co., 298 U.S. 492	32
Welch v. Henry, 305 U.S. 134	41
Williams v. Mayor, 289 U.S. 36	41

Statutes

Alaska Organic Act:

Section 3 (37 Stat. 512, 48 USCA Section 23)	7, 10, 18, 20, 26, 29
Section 9 (37 Stat. 514, 48 USCA Section 77)	11, 19, 32
Section 9 (37 Stat. 514, as amended, 48 USCA Section 78)	17, 18, 48
Section 20 (37 Stat. 518, 48 USCA Section 90)	7, 21

White Act:

Section 1 (43 Stat. 464, as amended, 48 USCA Section 222)	12, 24, 33
Section 8 (43 Stat. 467, 48 USCA Section 228)	11, 32

Alaska Public Works Act (63 Stat. 627, 48 USCA Section 486)	10, 30
---	--------

Civil Rights Act (R.S. Section 1977, 8 USCA Section 41)	5, 6, 16, 46
---	--------------

Session Laws of Alaska:

1921, Chapter 31	31
1923, Chapter 94	31
1925, Chapter 57	31
1929, Chapter 96	31
1933, Chapter 30	31
1949, Chapter 66	passim

TABLE OF AUTHORITIES CITED

v

Miscellaneous	Pages
Langdell, The Status of Our New Territories, 12 Harvard Law Review 365 (1899).....	9, 25
B. W. Denison, "Alaska Today", the Caxton Printers, Ltd., Caldwell, Idaho, 1949, p. 166.....	30
1948 U. S. Code Congressional Service, pp. 2479-2484.....	30
1949 U. S. Code Congressional Service, pp. 1848-1858.....	30

In the Supreme Court
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No. 329

M. P. MULLANEY, Commissioner of Taxa-
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Petitioner,

vs.

OSCAR ANDERSON and ALASKA
FISHERMEN'S UNION,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 162) is
reported at 191 F. 2d 123; that of the district court
(R. 14), at 91 F. Supp. 907.

JURISDICTION.

The judgment of the Court of Appeals was entered June 25, 1951 (R. 196). The petition for a writ of certiorari was filed September 17, 1951, and was granted November 5, 1951. The jurisdiction of this Court rests on Section 1251 of the new Federal Judicial Code.

QUESTION PRESENTED.

Whether an Act of the Legislature of the Territory of Alaska imposing on nonresident fishermen a license tax of \$50, and on resident fishermen, \$5, is a valid exercise of the taxing power of the Territory.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, infra, pp. i-viii.

STATEMENT.

Chapter 66, Session Laws of Alaska 1949 (enacted March 21, 1949), requires all commercial fishermen who take fish from the fishery resources of Alaska to obtain an annual license from the territorial Tax Commissioner. For such license the fee charged a nonresident fisherman is \$50; that charged a resident is \$5. On May 26, 1949 this action, seeking a declara-

tion from the court that Chapter 66 is unconstitutional and invalid insofar as it imposes a higher license fee on nonresidents than on residents and praying for an injunction to restrain the Tax Commissioner from making collection of the nonresident tax, was brought by Oscar Anderson, Secretary-Treasurer of the respondent Union, and the Alaska Fishermen's Union on behalf of some 3200 of its members who are nonresidents and who fish in Alaska each year (R. 2-6).

At the trial in the district court, on March 16, 1950 (R. 46) petitioner introduced testimony which showed, among other things, that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen, that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents than with respect to the resident fishermen (R. 95-120). No attempt was made by respondents to contradict the testimony from which such findings were made. The district court consequently held that there were sufficient differences between resident and nonresident fishermen to justify the classification in the amount of license fees between the two, sustained the

4

validity of Chapter 66, and ordered that the complaint be dismissed (R. 14-44).

On appeal the court below (with Chief Judge Denman dissenting) reversed the district court, holding (1) that the movement of nonresident fishermen each year into Alaska constitutes interstate commerce (R. 169); (2) that the necessary effect of the imposition of a higher tax on the nonresidents was to discourage, hamper, and burden such commerce (R. 171); (3) that no facts appeared in the record to sustain the discrimination, and moreover, that the existence of the discrimination by itself demonstrated its invalidity and overcame any presumption of validity which might otherwise attach to Chapter 66 (R. 182); (4) that the Territory had no power over taxation different from that possessed by a state, and hence had no greater freedom in burdening commerce between the states and the Territory than it would if Alaska were a state (R. 169, 171-172, 185); and (5) that (for the foregoing reasons) so much of the tax under Chapter 66 as exceeds that charged resident fishermen is void (R. 185). By way of dictum, the court also stated that if it were not for *Haavik v. Alaska Packers' Association*, 263 U.S. 510, it would be obliged to find that the facts in the record would not be sufficient (under its interpretation of *Toomer v. Witsell*, 334 U.S. 385) to justify the differential in the tax, and that the discrimination would be, therefore, also in violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution (R. 185-

186). In argument in the court below, respondents also relied upon the application of Section 41 of the Civil Rights Act (8 USCA §41) to the legislation in question, but the court failed to construe this statute (R. 194).

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred:

1. In holding that Chapter 66, in imposing on non-resident fishermen a higher license fee than that exacted from resident fishermen, constitutes an unconstitutional burden on and discriminates against interstate commerce.
2. In holding that the Territory of Alaska has no more power over taxation than if it were a state, and hence, that the Territory, in enacting tax laws, is limited to the same extent as a state by the commerce clause of Article I, §8, of the federal Constitution.
3. In failing to recognize—in view of the record in this case—the presumption that Chapter 66 is constitutional, and in failing to require respondents to maintain their burden of proof that the \$50 tax is unreasonable, arbitrary or excessive.
4. In holding that if it were not for *Huavik v. Alaska Packers' Association*, 263 U.S. 510, the differential in tax between nonresidents and residents would constitute a violation of the privileges and immunities clause of Article IV, §2, of the federal Constitution.

5. In failing to construe Section 41 of the Civil Rights Act (8 USCA §41).

SUMMARY OF ARGUMENT.

I.

The validity of Chapter 66, which imposes on non-resident fishermen a license tax greater in amount than that exacted from residents, cannot be determined by application of those clauses of the Constitution relating to interstate commerce, privileges and immunities of state citizenship; or equal protection of the laws, since none of them are a limitation on the legislative power of the Territory of Alaska. The reason for this conclusion is this: Obviously, certain constitutional provisions were intended to apply only to states and not to territories of the United States. Examples of these are (1) those parts of Article I and of the Fourteenth and Seventeenth Amendments relating to the United States Senate and House of Representatives; (2) that portion of §9 of Article I which prohibits Congress from giving any preference by regulation of commerce or revenue to the ports of one state over those of another, *Alaska v. Troy*, 258 U.S. 101, 111; (3) that part of Article III, §2, which limits jurisdiction of the courts of the United States to controversies between citizens of different states, *Hepburn v. Elzey*, 2 Cranch 445, 452, *New Orleans v. Winter*, 1 Wheat. 91, 94, *National Mutual Insurance Co. v. Tidewater*.

Transfer Co., 337 U.S. 582; and (4) the Tenth Amendment. Hence, the broad language of §3 of the Alaska Organic Act, which gives the Constitution of the United States "the same force and effect within the said Territory as elsewhere in the United States" (37 Stat. 512, 48 USCA §23), cannot be interpreted as referring to all provisions of the Constitution, but must be limited to only those parts which are applicable to the Territory. See concurring opinion of Mr. Justice White in *Downes v. Bidwell*, 182 U.S. 244, 291-292; *Alaska v. Troy*, 258 U.S. 101, 110. Therefore, if for good reasons it appears that the commerce clause, the privileges and immunities clause of Article IV, and the equal protection clause of the Fourteenth Amendment were intended to be a limitation solely upon the legislative power of the states, as distinguished from the territories, it will be perfectly logical to hold that those provisions were not extended to the Territory of Alaska by §3 of the Organic Act.

1. Although it is necessary for the courts to interpret the commerce clause in its application to the competing demands of State and National interests, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769-770, it is not necessary where the Territory is involved, since unlike a state it possesses no sovereignty and is completely subject to the will of Congress—even to the extent of congressional abrogation of any act of the Territorial legislature. 37 Stat. 518, 48 USCA §90; see *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314. Furthermore, Congress, in legis-

lating for the Territory, has full and complete power—which does not depend for its existence upon the commerce clause of the Constitution, *El Paso & North-eastern Railway Co. v. Gutierrez*, 215 U.S. 87, 95,—and in exercising this power it may constitutionally burden or discriminate against interstate commerce in order to accomplish a legitimate end. *Morgan v. Virginia*, 328 U.S. 373, 380. Hence, the courts should be reluctant to interfere when the power exercised is that of the legislature of the Territory and constitutes a means of accomplishing an end that would be desired by Congress. Cf. *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 313-314, for otherwise there would be danger of an unlawful interference by the judiciary with the power exclusively vested in Congress by Article IV, §3, of the Constitution to legislate for the Territory. There is, therefore, no compelling reason why the commerce clause should have the consequential effect of limiting territorial action. *Buscaglia v. Ballester*, 162 F. 2d 805, 806-807, certiorari denied 332 U.S. 816.

2. The privileges and immunities clause of Article IV, §2, has no application here since that clause “... must be read in conjunction with the Tenth Amendment to the Constitution”, (concurring opinion of Mr. Justice Frankfurter in *Toomer v. Witsell*, 334 U.S. 385, 407), and has for its primary purpose the fusing into one Nation of “... a collection of independent, sovereign States”, *Toomer v. Witsell*, supra, p. 395. Alaska being a territory and not a state, the Tenth

9

Amendment has no application, and moreover Alaska is anything but "independent" or "sovereign" since all its actions depend completely upon the will of Congress. See *Anderson v. Scholes*, 12 Alaska 295, 83 F. Supp. 681, 687. Hence, this Court was correct in holding in *Huavik v. Alaska Packers' Association*, 263 U.S. 510, 515, that the privileges and immunities clause is a limitation only upon the States and not upon the Territory of Alaska. Cf. *Duchay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 762, 775.

3. Neither is the equal protection clause of the Fourteenth Amendment a standard against which Territorial legislation is to be tested. This amendment consists mainly of prohibitions aimed exclusively at the States and not at Congress, and since all power over territories is vested in Congress, there was no practical reason for extending these limitations to territories of the United States. See Langdell, *The Status of Our New Territories*, 12 Harvard Law Review 365, 376, (1899). Thus, the classification in Chapter 66 is to be tested against the Fifth Amendment to the Constitution, (see *Farrington v. Tokushige*, 273 U.S. 284, 299), which contains no equal protection clause but restrains only such discriminatory legislation as amounts to a denial of due process. *Hirabayashi v. United States*, 320 U.S. 81, 100.

II.

Even if it had been the intention of Congress in enacting § 3 of the Alaska Organic Act (37 Stat. 512,

48 USCA § 23) to give Alaska no greater taxing power than that possessed by the states, subsequent congressional acquiescence in a taxing scheme such as that contained in Chapter 66 has constituted a waiver or removal of the limitations of the commerce clause, the privileges and immunities clause of Article IV, and the equal protection clause of the Fourteenth Amendment as far as license taxes on fishermen in Alaska are concerned. This is apparent from the following:

(1) The primary objective of Congress in making "all needful rules and regulations" for the Territory (Article IV, § 3, United States Constitution) is to develop the Territory's natural resources and increase its permanent population. This objective is evidenced by the recently enacted Alaska Public Works Act (Act of Aug. 24, 1949, 63 Stat. 627, et seq., 48 USCA § 486), which has for one of its primary purposes "... the settlement and increase (of) the permanent residents of Alaska ..." (48 USCA § 486).

(2) Alaska's greatest natural resource is its fisheries (R. 168). Therefore any action by the Territorial legislature which would reasonably tend to develop this resource and increase the permanent population of the Territory would logically meet with congressional approval.

(3) The business of fishing in Alaska has always been a main subject for consideration by Congress. See *Alaska Pacific Fisheries v. Territory of Alaska*,

236 F. 52, 57-58, and laws pertaining to Alaska fisheries in 48 USCA §§ 221-247.

(4) Alaska has had for nearly thirty years a license tax on nonresident fishermen greater in amount than that imposed on residents, and at no time during this period has Congress shown any sign of dissatisfaction with this exercise of legislative power. Cf. *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277-278, or with the interpretation given it by the courts. See *Haavik v. Alaska Packers' Association*, 263 U.S. 510; *Anderson v. Smith*, 71 F. 2d 493.

(5) As far as the business of fishing was concerned, Congress was not content with the general extension of Territorial legislative power "to all rightful subjects of legislation" (Alaska Organic Act, §9, 37 Stat. 514, 48 USCA §77), which would have constituted a sufficient basis for Territorial taxation. Cf. *Peacock & Co. v. Pratt*, 121 F. 772, 775-776, but made specific reference to the Territorial power of taxation with respect to the fisheries of Alaska (White Act, §8, 43 Stat. 467, 48 USCA §228).

(6) A scheme of tax incentive such as that contained in the classification in Chapter 66 has a natural tendency to encourage those who earn their livelihood from the fisheries to acquire a local residence and to promote rather than retard the permanent growth of population in the Territory and achieve ultimate congressional objectives.

Hence, Congress having waived the limitations of those clauses of the Constitution pertaining to commerce, privileges and immunities, and equal protection of the laws, as far as is concerned a taxing scheme such as that contained in Chapter 66, the Alaska legislature, in classifying resident and nonresident fishermen, is restrained only by the due process clause of the Fifth Amendment, or by the standard established by Congress that citizens shall not be denied the right to fish in the waters of Alaska (White Act, §1, 43 Stat. 464, 48 USCA §222)—either of which would appear to restrain only such discriminatory legislation as would amount to a practical prohibition of the right of a nonresident fisherman to fish in the waters of Alaska. See *Anderson v. Smith*, 71 F. 2d 493, 495. Respondents have not even suggested that the \$50 tax has such an effect. There was good reason then to hold, as this Court has done, that the power of taxation of the Territory, at least with respect to fisheries, is "express and unlimited," *Alaska Fish Co. v. Smith*, 255 U.S. 44, 49, and an "unlimited power expressly given", *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277. Chapter 66 is, therefore, valid against the assertions that the limitations in those clauses of the Constitution relating to commerce, privileges and immunities of state citizenship, and equal protection of the laws have been contravened.

III.

Even if Alaska were a state and the Constitution did not thus have a limited application, Chapter 66

would still be perfectly constitutional and valid. The record clearly shows that thousands of nonresident fishermen come to Alaska each year to fish during the relatively short fishing season, that as soon as the fishing season is over they depart from the Territory, that they have no homes or other ties in Alaska, that there have been large scale evasions of payment of the nonresident fishermen's license tax by this class of fishermen, that the difficulties encountered by the Tax Commissioner in collection of the license tax from the nonresidents are nearly insuperable, and that the burden, expense and inconvenience of such collection are substantially greater with respect to the nonresidents than with respect to the resident fishermen (R. 95-120).

1. Hence, as far as equal protection is concerned, it can hardly be said that the classification between resident and nonresident fishermen in Chapter 66 does not rest on substantial differences bearing a rational relation to the object of the legislation, which is principally to raise revenue. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415. A presumption of constitutionality was raised which cast upon respondents the burden of demonstrating very clearly that either the purpose or effect of the statute was a hostile or oppressive discrimination against the nonresident fishermen. *Madden v. Kentucky*, 309 U.S. 83, 88; *Metropolitan Insurance Co. v. Brownell*, 294 U.S. 580, 584. This burden they have failed to maintain, apparently on the theory that in order to sustain Chap-

ter 66, the Territory must prove that the differential in tax is equal to the difference in costs of collection between the nonresident and resident taxes. Such a position, of course, is untenable for if the legislature, in enacting tax laws, is forced to consider with mathematical exactitude the difference between classes, then it can hardly function as a legislature. Such an interpretation of equality of taxation would constitute, in effect, a serious blow at the Territorial government's most vital function—its power to raise revenue for its continued existence, and would constitute an intolerable supervision completely beyond the protection which the equal protection clause of the Fourteenth Amendment was intended to assure. Cf. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. Thus, because of the showing made by petitioner, and because respondents have made no attempt to maintain their burden of establishing unconstitutionality, it must be held that the classification in Chapter 66 does not violate the equal protection clause of the Fourteenth Amendment.

2. When an act is alleged to violate the commerce clause, the presumption of validity also attaches and the burden rests upon one assailing the statute to prove its invalidity in this respect. Particularly is this true when a tax like the one here is directly laid upon a local business subject to local taxation, and only incidentally affects interstate commerce. See *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*,

301 U.S. 183, 187-188. It may well be true that the freedom of persons to travel from the States to Alaska is a proper subject of the commerce clause, (see *Edwards v. California*, 314 U.S. 160, 172); but to extend this protection to give a citizen of a state refuge from taxation which has not been shown to impose any restraint or undue burden upon him, is to take such immunity from taxation and extend it far beyond the interests put forward to justify it and to a point not necessary for the protection and uniformity of national commerce. Therefore, since respondents have failed to maintain their burden of showing any actual restraint resulting from the imposition of a \$50 fishing license tax, Chapter 66 cannot be declared invalid on the ground that it constitutes an unconstitutional burden upon or discrimination against interstate commerce. See *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251.

3. Implicit in that portion of the lower court's opinion dealing with the privileges and immunities clause of Article IV, § 2 (R. 185-186), is the thought that petitioner had not made a sufficient showing and that it was his further obligation, in order to sustain the higher tax on nonresidents, to prove that the tax differential in Chapter 66 was equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting the taxes from residents. But to interpret this clause as precluding all differences in taxation, rather than those which have been proved by the one attacking the statutory classifica-

tion to be arbitrary and unreasonable, is, we submit, clearly erroneous; for such an interpretation takes the iron rule of equal taxation, which the equal protection clause has failed to impose, *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, 237, and makes it the standard against which taxing classifications must be tested where state citizenship is involved. This would constitute a very severe restriction on the taxing power of the Territory, wholly beyond the protection that the privileges and immunities clause was intended to assure. Hence, we submit that if the classification in Chapter 66 does not violate the requirements of equal protection, it cannot be condemned by invoking the privileges and immunities clause of Article IV, § 2, of the Constitution.

IV.

1. The Civil Rights Act (R.S. § 1977, 8 USCA § 41) is by its express terms applicable to territories as well as states. But since its purpose was to prevent the denial to one of equality of rights under law because of alienage or color, *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 419-420, its application to the Territory does not have the effect of adding to that required minimum of equality of law secured by the due process clause of the Fifth Amendment (see *Truax v. Corrigan*, 257 U.S. 312, 332), which, because of the inapplicability of the equal protection clause of the Fourteenth Amendment to territories, is the standard that limits territorial legislatures where tax classifications are involved. On the other hand, even if the Civil Rights Act did demand

equality of taxation between resident and nonresident fishermen, it could not be given a broader scope than the Fourteenth Amendment, since it and the Amendment "... were closely related both in inception and in the objectives which Congress sought to achieve", *Hurd v. Hodge*, 334 U.S. 24, 32. Therefore, if Chapter 66 does not violate the equal protection clause of the Fourteenth Amendment, the requirements of the Civil Rights Act are satisfied.

2. § 9 of the Alaska Organic Act requires that "all taxes shall be uniform upon the same class of subjects ..." (37 Stat. 514, as amended, 48 USCA § 78). But even if this provision has application to other than ad valorem property taxes, it would still require no greater measure of uniformity or equality of taxation than that demanded by equal protection of the laws. *Alaska Steamship Co. v. Mullaney*, 180 F. 2d 805, 817-818. Therefore, if the classification in Chapter 66 does not violate the Fourteenth Amendment, it does not contravene § 9 of the Alaska Organic Act.

ARGUMENT.

I.

CHAPTER 66 IS VALID SINCE THE CONSTITUTION OF THE UNITED STATES DOES NOT APPLY WITH THE SAME FORCE TO THE TERRITORY OF ALASKA AS IT DOES TO THE SEVERAL STATES.

The court below has held that the imposition of a tax on nonresident fishermen greater in amount than that exacted from residents constitutes an unconsti-

tutional burden against interstate commerce (R. 171), and is invalid for that reason (R. 185). It further stated that the same result would have been reached under the privileges and immunities clause of Article IV, § 2, of the Constitution were it not for the holding in *Haavik v. Alaska Packers' Association*, 263 U.S. 510, that this clause is inapplicable to the Territory (R. 186). Although the court below did not discuss it, respondents also had urged, both in the district court (R. 4) and in the Court of Appeals (R. 166), that this classification between resident and nonresident fishermen was a violation of the equal protection clause of the Fourteenth Amendment to the Constitution.

Obviously if it can be shown that neither the commerce clause, the privileges and immunities clause of Article IV, or the equal protection clause of the Fourteenth Amendment are a limitation on the legislature of the Territory, as they would be if Alaska were a state, then it would necessarily follow that the holding of the court below was erroneous and that respondents' claims of invalidity of Chapter 66 would have no merit. To a large extent the solution of this problem depends upon the meaning to be given to certain portions of §§ 3 and 9 of the Alaska Organic Act. The former provides in part that—

"The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." (37 Stat. 512, 48 USCA § 23).

The latter, i.e., § 9, contains this provision:

"The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . ." (37 Stat. 514, 48 USCA § 77).

There are certain provisions of the Constitution that can possibly have no application to a territory and thus cannot have the "same force and effect" therein as they do in the States. Such are: (1) Those parts of Article I and of the Fourteenth and Seventeenth Amendments relating to the United States Senate and House of Representatives—it never having been claimed that Alaska, in the absence of statehood, could have any representation in the Senate and other than a voteless delegate in the House of Representatives; (2) that portion of § 9 of Article I which prohibits Congress from giving any preference by any regulation of commerce or revenue to the ports of one state over those of another, which this Court has held in *Alaska v. Troy*, 258 U.S. 101, 111, does not include an organized and incorporated territory such as Alaska; (3) the provisions of Article II and of the Twelfth Amendment pertaining to the election of the President and Vice-President of the United States, since Alaska, not being entitled to Senators and Representatives in Congress, cannot through its legislature appoint electors; (4) that portion of Article III, § 2, which limits jurisdiction of the courts of the United States to controversies between citizens

of different states, since this Court has held that within the meaning of that clause neither a citizen of the District of Columbia, *Hepburn v. Ellzey*, 2 Cranch 445, 452, or of a territory, *New Orleans v. Winter*, 1 Wheat. 91, 94, has the standing of a citizen of one of the States of the Union; (see, also, *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582); (5) Article V, which pertains to amendments to the Constitution by application of the legislatures of "two-thirds of the several states"; and (6) the Tenth Amendment, since the people of Alaska have no reserved powers at all but only those expressly delegated to them by Congress. No one can seriously argue that the words "state" or "states" as used in the foregoing provisions of the Constitution have at any time been intended to include territories. Hence, § 3 of the Organic Act, in extending the Constitution to the Territory and giving it the same force and effect therein as elsewhere in the United States, must have been intended to include only those provisions of the Constitution which are applicable to the Territory. See concurring opinion of Mr. Justice White in *Downes v. Bidwell*, 182 U.S. 244, 291-292; *Alaska v. Troy*, 258 U.S. 101, 110. This being true, then it is perfectly logical to hold that those clauses of the Constitution pertaining to interstate commerce, privileges and immunities of state citizenship, and equal protection of the laws, will not limit Territorial action if for good reasons it appears that they were not meant to be applicable to the Territory when the Constitution was extended to Alaska.

1. The commerce clause does not limit Territorial action.

This Court has held that the commerce clause of the Constitution not only confers upon Congress the power to prescribe legislation for the protection and encouragement of commerce among the states, but also has the consequential effect of limiting state legislation in certain instances where Congress has not acted. *Freeman v. Hewit*, 329 U.S. 249, 252. The reason for this conclusion is based upon the principle that there are certain phases of national commerce "... where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose." *Morgan v. Virginia*, 328 U.S. 373, 377, and which "... demand that their regulation, if any, be prescribed by a single authority." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767. It has been also held that Congress has left it to the courts to be the final arbiter of the competing demands of state and national interests and to interpret the commerce clause in its application thereto, because of the possible destructive consequences to commerce if the protection of the courts were withdrawn. *Southern Pacific Co. v. Arizona*, *supra*, pp. 769-770.

It is not necessary, however, to leave this matter to the courts where the Territory is involved, since unlike a state the former possesses no sovereignty and is completely subject to the will of Congress, even to the extent of congressional abrogation of any act of the Territorial legislature. (37 Stat. 518, 48 USCA § 90). See *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314. Furthermore, there are

possible instances where Congress, in order to accomplish some legitimate purpose in the Territory under the authority of the second clause of Article IV, § 3, of the Constitution, might desire to enact legislation which incidentally would have the effect of burdening or discriminating against commerce, and such action the courts could not invalidate under the commerce clause as they could if it were that of a state. *Morgan v. Virginia*, 328 U.S. 373, 380. This Court then should be reluctant to interfere when the action is that of the Territorial legislature and constitutes an effective means of accomplishing an end that would be desired by Congress, for otherwise there would be the grave danger of an unlawful interference by the judiciary with the power exclusively vested in Congress to legislate for the Territory—a power which does not depend for its existence or its validity upon the commerce clause of the Constitution. See *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314; *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U.S. 87, 95; *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 500. Therefore, since Congress has full and complete legislative authority over the Territory of Alaska, there is no reason why the commerce clause should have the consequential effect of limiting any action by the Territorial legislature. *Buscaglia v. Ballester*, 162 F. 2d 805, 806-807, certiorari denied, 332 U.S. 816.

2. The privileges and immunities clause of Article IV, §2, does not limit Territorial action.

There is good reason for concluding, as was done in *Haavik v. Alaska Packers' Association*, 263 U.S. 510, 515, that the privileges and immunities clause of Article IV is not applicable to the Territory and thus does not have the same force and effect therein as it does elsewhere in the United States. This clause "must be read in conjunction with the Tenth Amendment to the Constitution," (concurring opinion of Mr. Justice Frankfurter in *Toomer v. Witsell*, 334 U.S. 385, 407); and, as was stated by Mr. Chief Justice Vinson in the majority opinion of that case (p. 395):

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of *independent, sovereign States*." (Emphasis added.)

But Alaska is a territory and not a state, and because of the distinction between the two, can make no claim to being sovereign. Moreover, it is anything but "independent" since all its actions depend completely upon the will of Congress. Hence, the Tenth Amendment having no application to the Territory, and the Territory not being part of the "collection of independent, sovereign States"; it is clear that the privileges and immunities clause was intended to be applicable only to states and not to territories. Furthermore, in *Paul v. Virginia*, 8 Wall. 168, Mr.

Justice Field, in speaking of this clause stated (p. 180):

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the *advantages resulting from citizenship in those States are concerned.*" (Emphasis added.)

But since "Alaska does not yet enjoy the political status which would bring its residents within the constitutional meaning and definition of 'citizens' as applied to citizens of the United States who are domiciled in the States and therefore citizens of the States," *Anderson v. Scholes*, 12 Alaska 295, 83 F. Supp. 681, 687, the right to fish in the waters of Alaska, although one recognized by Congress in the White Act (43 Stat. 464, 48 USCA § 222), is not an advantage resulting from citizenship in a State within the meaning of the privileges and immunities clause, and is, therefore, not a right or advantage for the denial of which one can invoke the protection of this clause of the Constitution. Hence, this clause is a limitation upon the states only and does not restrict the action of the legislature of the Territory of Alaska. Cf. *Duchay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 768, 775.

3. The equal protection clause does not limit Territorial action.

As pointed out above, the word "states" as used in various parts of the Constitution has a definite meaning, i.e., "... the political organizations that form

the Union and alone have power to amend the Constitution," Mr. Justice Frankfurter dissenting in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 653. This being the case, no logical reason suggests itself why, in the adoption of the Fourteenth Amendment, any more than in the original Articles, the word "state" was meant to include a territory of the United States. See *Langdell, The Status of our New Territories*, 12 Harvard Law Review 365, 376 (1899). Moreover, if the equal protection clause were applicable, it would be only consistent to hold that another portion of the same sentence in which it is contained—that relating to due process—would also be applicable. But this Court has held that the due process clause of the Fifth Amendment is the one that restrains territorial action. *Farrington v. Tokushige*, 273 U.S. 284, 299, and not that of the Fourteenth Amendment. Hence, if one phrase of one sentence in §1 of the Fourteenth Amendment—that relating to due process—has no application to the Territory, it would be only logical to conclude that another phrase of the same sentence—that dealing with equal protection—should also be inapplicable. The only reasonable conclusion then is that the Fourteenth Amendment relates solely to the states and not to the territories, and that the latter are limited only by the Fifth Amendment which contains no equal protection clause but restrains only such discriminatory legislation by the Territory as amounts to a denial of due process. Cf. *Hirabayashi*

v. United States, 320 U.S. 81, 100; *Detroit Bank v. United States*, 317 U.S. 329, 337-338.

These conclusions then are inescapable: (1) When Congress formally extended the Constitution to the Territory of Alaska, it did so only so far as various provisions therein were applicable to territories, as distinguished from states; (2) neither logic nor reason will support the view that either the commerce clause, the privileges and immunities clause of Article IV, or the equal protection clause of the Fourteenth Amendment was intended to be a limitation upon the legislative power of the territories; and (3) that § 3 of the Organic Act (48 USCA § 23) in giving the Constitution the same force and effect within the Territory as elsewhere in the United States, did not, therefore, make those clauses of the Constitution a limitation upon the legislative power of the Territory of Alaska. Hence, Chapter 66, in exacting from nonresident fishermen a license tax greater in amount than that demanded of the residents, does not contravene these constitutional limitations.

And this conclusion is adhered to notwithstanding the general language in *Duncan v. Kahanamoku*, 327 U.S. 304, 317, to the effect that "... Congress did not intend the Constitution to have a limited application to Hawaii." This expression of opinion must be taken in connection with and limited to the case there decided, i.e., "... civilians in Hawaii are entitled to the constitutional guarantee of a fair trial to the same extent as those who live in any other part of our country" (p. 318), and should not serve as au-

thority for the general principle that all provisions of the Constitution are as fully applicable in the territories as they are in the states, See *Downes v. Bidwell*, 182 U.S. 244, 258-259.

II.

EVEN IF THE CONSTITUTION ORIGINALLY DID NOT HAVE A LIMITED APPLICATION TO ALASKA, SUBSEQUENT CONGRESSIONAL ACQUIESCENCE IN A TAXING SCHEME SUCH AS THAT CONTAINED IN CHAPTER 66 HAS CONSTITUTED A WAIVER OF CERTAIN CONSTITUTIONAL LIMITATIONS.

In *Downes v. Bidwell*, 182 U.S. 244, p. 271, Mr. Justice Brown stated that the following propositions could be considered as established:

"6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith."

If this general statement is applicable to those clauses of the Constitution which are being considered here, then an additional argument is immediately furnished for the conclusion reached in Part I of this brief that all parts of the Constitution were not meant to have the same force and effect in the Territory as elsewhere in the United States. That argument is as follows: As has already been pointed out, congressional legislation cannot be declared invalid by the courts on the grounds that it burdens interstate commerce, *Morgan v. Virginia*, 328 U.S. 373, 380; that it violates the privileges and immunities clause of Article

IV, § 2, *Duehay v. Acacia Mutual Life Insurance Co.*, 105 F. 2d 768, 775; or that it offends the equal protection clause of the Fourteenth Amendment, *Truax v. Corrigan*, 257 U.S. 312, 332, 340; *Steward Machine Co. v. Davis*, 89 F. 2d 207, 211, affirmed in 301 U.S. 548; *Neild v. District of Columbia*, 110 F. 2d 246, 256-257. Therefore, it is only logical to assume that Congress did not intend these restrictions on state action to limit the legislature of the Territory, for had they been once formally extended to the Territory, they would, under the rule in *Downes v. Bidwell*, supra, necessarily have the effect of constituting a limitation on congressional action. It is not to be presumed that Congress would thus have intended to so limit its sovereign power over the Territory which it possesses by Article IV, § 3, of the Constitution—a power that is full and complete. *Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 314; *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323.

On the other hand, if the rule announced in the *Downes* case, supra, should be limited to those fundamental limitations in favor of personal rights which are inherent in natural law and formulated in the Constitution, *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44; *Downes v. Bidwell*, supra, pp. 282-283, and if not included in these are the privileges and immunities of state citizenship under Article IV, § 2, and the equality demanded by the Fourteenth Amendment (as distinguished from the required minimum of equality guaranteed by due process—see *Truax v. Corrigan*, 257

U.S. 312, 332), then even if these provisions had been extended to the Territory under § 3 of the Organic Act (48 USCA § 23), they could later be restricted or limited in their application to Territorial legislation if Congress so desired because of the full and complete power that Congress has with respect to territories and because such action would not involve a denial of any fundamental right or immunity which goes to make up our freedoms. Cf. *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 585. In addition, the limitations of the commerce clause on the Territorial legislature could, too, be suspended in the same manner by Congress in its discretion, since if Congress can burden commerce to achieve a permitted end, *Morgan v. Virginia*, 328 U.S. 373, 380, it can, under Article IV, allow the Territorial legislature to burden commerce in order to accomplish a like end. Consequently, even assuming for the sake of argument that § 3 of the Organic Act (48 USCA § 23) gave these clauses of the Constitution the same force and effect within the Territory as elsewhere in the United States, Congress could, subsequent to the enactment of the Organic Act, by express or tacit consent, limit the restriction of these clauses in relation to certain actions of the Territorial legislature if Congress considered that desirable as a means of accomplishing a legitimate purpose. It is not difficult to find such consent as far as Chapter 66 is concerned.

First of all, it is reasonable to assume that since the political destiny of Alaska, like any incorporated territory, is ultimate statehood, the development of

natural resources, together with the settlement and increase of permanent population in the Territory, would be the primary objective of Congress in making "all needful rules and regulations" for the Territory under the authority of Article IV, § 3, of the Constitution. That this is the purpose of Congress is clearly shown, for example, by the recently enacted Alaska Public Works Act (Act of Aug. 24, 1949, 63 Stat. 627 et seq., 48 USCA § 486), which followed President Truman's special message to Congress on May 21, 1948.¹ The avowed purpose of this statute was—

"... to foster the settlement and increase the permanent residents of Alaska, stimulate trade and industry, encourage internal commerce and private investment, develop Alaskan resources, and provide facilities for community life through a program of useful public works." (48 USCA § 486.)²

Secondly, Alaska's greatest natural resource is its fisheries—in fact, fisheries constitute "the backbone of the Territory's economy with regard to permanent value, employment, and taxable wealth."³ Under these circumstances, then, any legislative action by the Territory which would tend to foster the development of this industry in such a manner as to promote the settlement of Alaska and increase its permanent pop-

¹See 1948 U. S. Code Congressional Service, pp. 2479-2484.

²For legislative history of this Act, see 1949 U. S. Code Congressional Service, pp. 1848-1858.

³B. W. Denison, "Alaska Today", the Caxton Printers, Ltd., Caldwell, Idaho, 1949, p. 166, referred to in the lower court's opinion at R. 168.

ulation would logically meet with congressional approval for it would have the direct result of promoting the end toward which Congress has directed its legislation with respect to Alaska.

It is, therefore, entirely reasonable to reach the conclusion that Congress over the years has indicated at the very least its tacit or implied consent to a scheme of taxation such as that contained in Chapter 66, for—

(1) the business of fishing was a main subject for consideration by Congress at the time of the adoption of the Organic Act (see *Alaska Pacific Fisheries v. Territory of Alaska*, 236 F. 52, 57-58, certiorari denied 242 U.S. 648, writ of error dismissed 249 U.S. 53), and since that time Congress has made comprehensive provisions for the regulation and conservation of the Alaska fisheries;⁴

(2) Alaska has had almost continuously since 1921 a license tax on nonresident fishermen greater in amount than that imposed on residents,⁵ and at no time during this thirty-year period has Congress shown any sign of dissatisfaction with this exercise of legislative power. Cf. *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277-278, or with the interpretation given it in 1923 by this Court in *Haavik v. Alaska Packers' Association*, 263 U.S. 510,

⁴See laws pertaining to Alaska fisheries in 48 USCA §§221-247.

⁵Chapter 31 Session Laws of Alaska 1921; Chapter 94 Session Laws of Alaska 1923; Chapter 57 Session Laws of Alaska 1925; Chapter 96 Session Laws of Alaska 1929 (declared invalid in *Freeman v. Smith*, 44 F. 2d 703 and 62 F. 2d 291); Chapter 30 Session Laws of Alaska 1933; and Chapter 66 Session Laws of Alaska, 1949.

or, in 1934, by the United States Court of Appeals for the Ninth Circuit in *Anderson v. Smith*, 71 F. 2d, 493;⁶

(3) although the Territory's authority to tax with respect to fisheries, as any other business, could probably have been based upon that part of § 9 of the Organic Act of Alaska, (37 Stat. 514, 48 USCA § 77), which extends the legislative power to "all rightful subjects of legislation", Cf. *Peacock & Co. v. Pratt*, 121 F. 772, 775-776, Congress was not content with this but made specific reference to the power of taxation with respect to the fisheries of Alaska;⁷ and

(4) such a scheme of tax incentive has a natural tendency to encourage those who earn their livelihood from the fisheries to acquire a local residence, and thus, while developing this great natural resource, to promote rather than retard the permanent growth of population and achieve ultimate congressional objectives.⁸

⁶For cases involving legislative construction by inaction or acquiescence, see *United States v. Elgin, Joliet & Eastern Railway Co.*, 298 U.S. 492, 500; *Missouri v. Ross*, 299 U.S. 72, 75.

⁷In § 8 of the White Act (43 Stat. 467, 48 USCA § 228) Congress, after making comprehensive provision for the regulation of the fisheries of Alaska, added this section: "Nothing contained in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title."

⁸For cases where tax exemptions have been sustained on the theory of promoting non-fiscal objects, see *Zero Transit Co. v. Georgia Commission*, 295 U.S. 285, 291; *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 512.

Consequently, even if a classification such as that in Chapter 66 would be invalid under the commerce, privileges and immunities, and equal protection clauses of the Constitution, if enacted by a state, congressional acquiescence as far as Territorial taxes relating to fisheries are concerned, has constituted a removal or waiver of these limitations. The only restrictions in classifying resident and nonresident fishermen would be those contained in the requirements of due process under the Fifth Amendment, or under the standard that Congress itself has established that no citizen of the United States shall be denied the right to fish in the waters of Alaska (White Act § 1, 43 Stat. 464, 48 USCA § 222)—either of which would appear to contain the same restriction, i.e., that the amount of tax charged any fisherman be not so great as to unreasonably interfere with the right of a citizen of the United States to engage in fishing in Alaska. As far as the latter limitation is concerned, this was the view previously adopted by the United States Court of Appeals for the Ninth Circuit in *Freeman v. Smith*, 44 F. 2d 703 (certiorari denied 282 U.S. 904), and 62 F. 2d 291, and in *Anderson v. Smith*, 71 F. 2d 493. As Circuit Judge Wilbur stated in the latter case which involved a Territorial statute taxing nonresident fishermen \$25 and residents \$1 (p. 495):

"The question involved here, then, is not the power of the Legislature to discriminate between residents and nonresidents, but the question is whether or not the license fee imposed by the territorial Legislature is an unreasonable interference with a right granted by Congress, and,

therefore, impliedly prohibited by Congress. It is clear then that so long as the license tax imposed by the territorial Legislature upon the citizens of the United States who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with, the exercise of the right granted by Congress, it is within the power of the territorial Legislature. We cannot say that the license fee imposed by (the) territorial Legislature in 1933 and now under attack is so unreasonable as to conflict with the act of Congress granting the right to fish (48 USCA § 222)."

Nor can it be said here that the tax imposed under Chapter 66 on nonresident fishermen is so unreasonable as to conflict with the act of Congress granting the right to fish. First of all, enormous increases in the cost of living during the last twenty years will justify an increase in tax from \$25 in 1933 to \$50 in 1949 (see dissenting opinion of Chief Judge Denman in Court below, (R. 193); and, secondly, a gill-net fisherman who averages net earnings of approximately \$2500 for a fishing season of twenty days (R. 11-13, 17, 80-81), or a troller who averages approximately \$3500 in a season of from four to five months (R. 10-11, 17) could hardly contend that a tax of \$50 is so exorbitant and unreasonable as to practically prohibit or interfere with the right to fish which has been granted by Congress. As a matter of fact, no such assertion has been made by respondents in this case.

There is good reason, then, for holding, as the court has done, that the power vested by Congress in the Territorial legislature to tax with respect to the fisheries of Alaska is "express and unlimited", *Alaska Fish Co. v. Smith*, 255 U.S. 44, 49, and an "unlimited power expressly given," *Pacific American Fisheries v. Territory of Alaska*, 269 U.S. 269, 277.

Chapter 66 is, therefore, valid against the assertions that the limitations contained in those clauses of the Constitution pertaining to commerce, privileges and immunities, and equal protection of the laws have been transcended. To hold otherwise will be to seriously impair the Territory's acknowledged power of taxation, with the necessary result of retarding and hampering well recognized congressional objectives relating to Alaska. This, in effect, would constitute an attempt by the judiciary to impose limitations upon the exercise by Congress of its legislative power over the Territory—limitations that are very clearly not authorized by the Constitution.

III.

CHAPTER 66 WOULD BE CONSTITUTIONAL EVEN IF ALASKA WERE A STATE.

Assuming, for the sake of argument, that those clauses of the Constitution relating to commerce, privileges and immunities of state citizenship and equal protection of the laws limit the legislative power of the Territory to the same extent as they

do state legislation, there are still perfectly valid and independent reasons for sustaining the validity of Chapter 66 against the assertion that the classification between resident and nonresident fishermen offends these constitutional prohibitions.

1. The record shows that thousands of nonresident fishermen come to Alaska each year (R. 52-53, 69) and engage in fishing for salmon in Alaska during fishing seasons which vary from twenty days in Bristol Bay (R. 11, 80-81) to four or five months elsewhere (R. 10-11), during which time they enjoy the protection of local government. But in exacting from such nonresidents their fair share of the cost of governmental protection by the fishermen's license tax, extraordinary and almost insuperable difficulties are encountered by petitioner and his agents. Nonresident trollers come to Alaska each year in their own power boats and fish along the many miles of Alaska coastline. They own no property and have no homes in the Territory (R. 85-86), they are not required by shipping laws to enter or clear upon arrival in or departure from the Territory and their boats are not only large and in first-class shape (R. 101), but are supplied before leaving the States for the fishing grounds in Alaska with necessary staples and fishing gear (R. 99). These nonresident trollers not only neglect to purchase the nonresident fishing licenses, but even deliberately evade such payment by dodging the tax collector (R. 99-107), by warning each other by radiophone of his proximity (R. 99-100, 105) and by purchasing resident fishing licenses (R. 107).

The circumstances, however, with respect to resident trollers are entirely different and no such tremendous enforcement problems must be met. Since the residents have homes in the Territory and live in villages and towns where agents of petitioner are situated, it is a simple matter for petitioner's deputies to collect the tax before the fishing season opens (R. 97-98). Violators among the residents can easily be apprehended at their places of residence after the season is closed (R. 108).

Much of the same burden and inconvenience is encountered with respect to collection of the license tax from nonresident gillnet fishermen, trap watchmen and tendermen. Again, these nonresident fishermen will not voluntarily pay the tax, and again, the tax collector must seek them out by the process of covering by boat or airplane many miles of area (R. 109). The efforts to enforce the statute here, however, are even more unlikely to be met with success than in the case of trollers because of the short fishing season of approximately twenty days (R. 80-81). Also, as in the case of the nonresident troller, the nonresident gillnet fishermen will purchase resident licenses in an attempt to avoid the fee that they are required to pay (R. 109). And there is still difficulty in enforcement with respect to nonresidents employed by canneries in Bristol Bay, where license fees are ordinarily collected for the Territory by the canneries (R. 110). If all the fees from all nonresident fishermen there were collected pursuant to this plan, all would be well, but as the evidence

shows, even here there is evasion (R. 110-113). The same situation exists with respect to nonresident trap watchmen employed by canneries (R. 114).

As in the case of the resident trollers, there is no real enforcement problem with respect to resident gillnet fishermen. Those who are not employed by canneries ordinarily purchase licenses before the fishing season opens (R. 108); and in the cases where canneries deduct the license fees from wages, those persons who have fished only for a short time, from whom no deductions are made by the canneries, and who thus evade payment of the tax, (R. 110-111), are not ordinarily resident fishermen but non-residents. As the evidence shows, the resident gillnetters who work for canneries during the season at Bristol Bay need licenses to fish in a later season of the year (R. 112).

In view, therefore, of the showing that nonresident fishermen own no property and have no homes or other ties in Alaska, that they come to the Territory only for a relatively short period of time and depart therefrom immediately after the fishing season closes, that they deliberately evade the law by refusing to pay the license tax and by throwing obstacles in the path of the tax collector who must seek them out along the thousands of miles of Alaska coastline, it is little wonder that ninety percent of the cost of collecting the taxes under Chapter 65 is incurred in collecting or attempting to collect them from the nonresident fishermen (R. 21, 120). Because, then, of these facts, it can hardly be con-

tended that this classification does not rest on substantial differences bearing a rational relation to the principal object of the legislation, which is the raising of revenue, *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, or that a state of facts cannot be conceived to sustain the difference in treatment given. *Tax Commissioners v. Jackson*, 283 U. S. 527, 537. Administrative convenience and expense in the collection of the tax will alone afford a sufficient justification for the imposition of a higher tax on nonresidents. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511; *Madden v. Kentucky*, 309 U. S. 83, 89-90.

It may well be that without any evidence of the kind petitioner has presented, the Court would, under the equal protection clause, be constrained to hold Chapter 66 invalid on the ground that no state of facts could be conceived that would rationally support the discrimination. See dissenting opinion of Mr. Justice Stone in *Colgate v. Harvey*, 296 U. S. 404, 441. But this could not be the case when, as here, more than enough facts have been proved to attach to this statute a presumption of constitutionality, one that can be overcome only by the most explicit demonstration that either the purpose or effect of this statute was a hostile or oppressive discrimination against the nonresident fishermen. See *Madden v. Kentucky*, 309 U. S. 83, 85; *Lawrence v. State Tax Commission*, 286 U. S. 276, 284. Thus the burden of overcoming this presumption and establishing the invalidity of Chapter 66 was cast

upon the respondents. *Metropolitan Insurance Co. v. Brownell*, 294 U. S. 580, 584; *Lawrence v. State Tax Commission*, supra, p. 283.

Respondents have failed to maintain their burden in this respect. All they have done is to demand from the Tax Commissioner, by interrogatories (R. 33-34), a statistical breakdown or analysis of the costs of collection, respectively, of resident and nonresident fishermen's license taxes. And when this was not forthcoming (for good and sufficient reasons, as shown in the Tax Commissioner's answer to such interrogatories (R. 31-32), respondents simply sat back and did nothing to prove the allegations of their complaint, apparently on the theory that a judgment invalidating the statutory classification would necessarily follow if the Tax Commissioner did not keep a complete and detailed record showing a comparative analysis between resident and nonresident fishermen of the myriad items and operations involved in the process of collecting taxes from them. Thus, respondents adopted the rather unique theory that in order to sustain Chapter 66, the burden was upon petitioner to prove that the differential between the \$50 fee imposed upon nonresidents and the \$5 fee upon residents is exactly equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting the taxes from residents.

Such a position is, of course, untenable. Nearly every revenue measure contains classifications, and if in order to write a valid tax law under requirements

of equal protection, the legislature were forced to consider with mathematical exactitude the differences between the classes selected, then it could hardly function as a legislature. To interpret equality of taxation as constituting such a narrow restrictive limitation upon legislative authority would, in effect, be striking at the government's most vital function—its power to raise revenue for its continued existence. This would be an intolerable supervision completely beyond the protection which the equal protection clause of the Fourteenth Amendment was intended to assure. See *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. All that is necessary to sustain this classification is the uncontradicted proof that the inconvenience, burden and expense in enforcing the provisions of the act are substantially greater with respect to nonresidents than to residents, and that the relation, therefore, between means and end in this legislative action is not "wholly vain and fanciful, an illusory pretense." *Williams v. Mayor*, 289 U.S. 36, 42. Equal protection has never demanded that the legislature "maintain rigid rules of equal taxation, . . . resort to close distinctions, or . . . maintain a precise scientific uniformity . . ." *Welch v. Henry*, 305 U.S. 134, 145. It has been repeatedly held that an iron rule of equal taxation is not required by the Constitution. *Tax Commissioners v. Jackson*, 283 U.S. 527, 537. See also *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 284; *General American Tank Car Corp. v. Day*, 270 U.S. 367, 373-374; *Travelers' Insurance Co. v. Connecticut*, 185 U.S. 364; *State Railroad Tax Cases*, 92 U.S. 575, 612. There

is, therefore, no valid basis for holding that the classification in Chapter 66 violates the equal protection clause of the Fourteenth Amendment.

2. The presumption of validity likewise attaches, and the burden of proving unconstitutionality also rests upon respondents, when it is asserted that the higher tax on nonresidents discriminates against interstate commerce. See *Davis v. Department of Labor*, 317 U.S. 249, 257. Particularly is this true when the tax assailed, like the one here, operates *directly* only upon a local privilege, i.e., fishing in Alaska waters, and if upon interstate commerce at all, only incidentally by reason of the fact that many fishermen, not content to endure the rigors of Alaska the year around, prefer a permanent residence in the warmer climates of the States, or perhaps because the corporate salmon industry, for reasons of its own, prefers nonresidents to residents in its business. See *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187-188. Thus, it having been demonstrated by petitioner that there is a rational purpose for the imposition of a higher tax on nonresident fishermen, the burden is upon respondents to show that the additional amount charged was excessive for that purpose. Cf. *Ingels v. Morf*, 300 U.S. 290, 296. No such showing has been made, for respondents made no attempt to prove, for example, that no additional burden was cast upon the Tax Commissioner in collecting the tax from nonresidents; that this class of fishermen do not

escape the various taxes imposed by municipalities and school districts in the Territory, to which residents are subject; or that nonresidents, to the same extent as residents, are subject to the substantial increased living costs which are so prevalent in the Territory. Thus, respondents have failed to show, whatever discrimination might exist on the face of the statute, that there was any substantial discrimination in fact. Cf. *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481-482. Such a showing not having been made, Chapter 66 cannot be declared invalid on the ground that it constitutes an unconstitutional burden against interstate commerce. See *Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251.

Furthermore, the cases relied upon by the court below dealing with state burdens on commerce in connection with inspection fees (R. 183) and in connection with movement of persons across state boundaries (R. 169) as authority for the proposition implicit throughout the court's opinion (R. 182-183), that the burden is upon the Territory to demonstrate that the additional tax charged nonresidents does not exceed permissible limits, are inapplicable here. Those cases should be limited to like factual situations, i.e., where commerce is directly affected and not to an instance as here where the tax is directly laid upon a local business subject to local taxation and only incidentally upon interstate commerce. In the latter circumstance the burden rests upon one who challenges the legislation to actually show that there is an unconsti-

tutional burden upon or discrimination against interstate commerce. Cf. *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 413; *Bourjois, Inc. v. Chapman*, 301 U.S. 183, 187-188. It may well be that the freedom of persons to travel across state-territorial boundaries is referable to the commerce clause in proper cases. See *Edwards v. California*, 314 U.S. 160, 172. But to use this protection of the commerce clause to give to a citizen of the state refuge from taxation which in fact has not been shown to impose any restraint or undue burden upon him, is to take this immunity from taxation and extend it far beyond the interests that justify it and to a point not necessary for the protection and uniformity of national commerce.

3. The court below stated (R. 185-186) that if it were not for *Haavik v. Alaska Packers' Association*, 263 U.S. 510, and the privileges and immunities clause of Article IV, §2, of the Constitution did operate to control Alaska legislation, that the evidence produced by petitioner as justification for the imposition of a higher tax on nonresidents would not be sufficient to measure up to certain "tests" laid down in the case of *Tocmer v. Witsell*, 334 U.S. 385, chief among these being that contained in this statement of Mr. Chief Justice Vinson at pp. 398-399:

"The State is not without power, for example, to . . . charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose . . ." (Emphasis added.)

And since respondents made no attempt to prove that the \$50 fee on nonresidents is arbitrary or excessive, what the Court of Appeals must be holding is that the burden was upon the Territory to demonstrate that the tax differential did not exceed permissible limits; or, in other words, that it was equal to the difference between the cost of collecting the nonresident taxes and the cost of collecting taxes from residents. Thus, the Alaska legislature, "... in analyzing local evils and in prescribing appropriate cures", *Toomer v. Witsell*, supra, p. 396, is faced with the almost impossible burden of exact equality of taxation under this clause of the Constitution.

To interpret the privileges and immunities clauses as precluding all differences in taxation, rather than merely forbidding those that are arbitrary and unreasonable; and thus to extend its operation so that it does more than duplicate the protection afforded against discrimination by the equal protection clause of the Fourteenth Amendment, is, we submit, unreasonable. Under such an interpretation, not only are tax immunities multiplied to an alarming extent, but judicial control of legislative action with consequent restrictions upon it is so enlarged that the taxing power of the Territory, so essential for the continued existence of the government, is severely crippled. It is difficult to believe that the iron rule of equal taxation which the equal protection clause has failed to impose (see *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, 237), has now become the standard

against which tax classifications are to be tested where citizenship in a state is involved. This would constitute, as in the case of equal protection (*Cf. Ohio Oil Co. v. Conway*, 281 U.S. 146, 159), a restriction on taxing power which is wholly beyond the protection which the privileges and immunities clause of Article IV was intended to assure.

It is submitted, therefore, that if the classification in Chapter 66 does not merit condemnation as a denial of equal protection, it cannot be condemned by invoking the protection of the privileges and immunities clause. The burden should still be upon respondents to prove that this legislative scheme of taxation is arbitrary, unreasonable or capricious.

IV.

CHAPTER 66 DOES NOT VIOLATE THE CIVIL RIGHTS ACT OR §9 OF THE ORGANIC ACT OF ALASKA.

1. In *Martinsen et al. v. Mullaney*, 12 Alaska 455, 85 F. Supp. 76, 79, a case which preceded the principal one and which involved the validity of Chapter 66 as it related to nonresident halibut fisherman, the same district court as the one below was of the opinion that one portion of the Civil Rights Act (R.S. §1977, 8 USCA §41), by virtue of its express application to territories, extended the same standard of equality to territorial taxation as that furnished the states by the equal protection clause of the Fourteenth Amendment. The assertion in this case that

Chapter 66 violated the Civil Rights Act was not a subject of respondents' complaint in the district court (R. 2-6), but it was raised in the Court of Appeals (R. 165), and the failure of the court below to dispose of this question, together with other matters, was a subject of the dissenting opinion of Chief Judge Denman (R. 194-195).

Although this part of the Civil Rights Act is expressly made applicable to territories as well as states, it is applicable only to the extent of accomplishing the purpose for which it was enacted, which is to prevent the denial to one of equality of rights under law because of alienage or color, *Takahashi v. Fish and Game Commission*, 334 U. S. 410, 419-420. See also *Collins v. Hardyman*, 341 U. S. 651, 661. Obviously, the act was not designed or intended to limit territories, as distinguished from states, in the adjustments of their tax burdens, so as to add to that required minimum of equality of law secured by the due process clause of the Fifth Amendment, *Truett v. Corrigan*, 257 U. S. 312, 332, which, because of the inapplicability of the equal protection clause of the Fourteenth Amendment to territories, is the standard that limits territorial legislatures where tax classifications are involved. Hence, as far as Chapter 66 is concerned, if the Territorial legislature is not restricted by the equal protection clause of the Fourteenth Amendment, neither should it be restricted by the Civil Rights Act.

On the other hand, even if the Civil Rights Act does demand equality of taxation between resident

and nonresident fishermen, the equality demanded should be no greater than that imposed by the Fourteenth Amendment, for, as Mr. Chief Justice Vinson has pointed out in *Hurd v. Hodge*, 334 U. S. 24, 32:

"... that statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve."

Therefore, since the act cannot be given a broader scope than the amendment on which it is based, what has been said of the classification in Chapter 66 as it is affected by the Fourteenth Amendment sufficiently disposes of the assertion that it violates the Civil Rights Act.

2. Respondents have also complained (R. 4) that Chapter 66 violates that part of §9 of the Alaska Organic Act which requires that "all taxes shall be uniform upon the same class of subjects . . ." (37 Stat. 514, as amended, 48 USCA §78). But if this provision has application to other than ad valorem property taxes, it would still require no greater measure of uniformity or equality of taxation than that demanded by equal protection of the laws. *Alaska Steamship Co. v. Mullaney*, 180 F. 2d 805, 817-818; *Fox v. Standard Oil Co.*, 294 U. S. 87, 102; *Lake Superior Consolidated Iron Mines v. Lord*, 271 U. S. 577, 581. Therefore, if the classification in Chapter 66 does not violate the Fourteenth Amendment, it does not contravene §9 of the Alaska Organic Act.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Dated, Juneau, Alaska,

December 10, 1951.

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Attorney General of Alaska,

JOHN H. DIMOND,
Assistant Attorney General of Alaska,

HAROLD J. BUTCHER,
Special Assistant Attorney General of Alaska,
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(Appendix Follows.)

Appendix.

Appendix

Chapter 66, Session Laws of Alaska, 1949.

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, \$5.00; non-resident fisherman, \$50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months immediately pre-

ceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

Section 8. Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

Alaska Organic Act, §3.

(37 Stat. 512, 48 USCA §23)

The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

Alaska Organic Act, §9.

(37 Stat. 514, 48 USCA §77)

The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, * * *

Alaska Organic Act, §9.

(37 Stat. 514, as amended, 48 USCA §78)

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, * * *

Alaska Organic Act, §20.

(37 Stat. 518, 48 USCA §90)

All laws passed by the Legislature of the Territory of Alaska shall be submitted to Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect.

White Act, §1.

(43 Stat. 464, as amended, 48 USCA §222)

* * * nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce.

White Act, §8.

(43 Stat. 467, 48 USCA §228)

Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by sections 23, 24, 44, 45, and 67 to 90 of this title.

Alaska Public Works Act, §2.

(63 Stat. 627, 48 USCA §486)

The Congress declares that the purpose of sections 486-486j of this title is to foster the settlement and increase the permanent residents of Alaska, stimulate trade and industry, encourage internal commerce and private investment, develop Alaskan resources, and provide facilities for community life, through a program of useful public works.

Civil Rights Act

(R.S. §1977, 8 USCA §41)

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, licenses, and exactions of every kind, and to no other.

Chapter 31, Session Laws of Alaska, 1921

Section 1. Any person, firm or corporation prosecuting or attempting to prosecute, any of the following lines of business, or who shall employ any of the following appliances, in the Territory of Alaska, shall apply for and obtain a license and pay for said license, for the respective lines of business and appliances, as follows:

12th: **FISHERIES:** * * * (h) Fishermen who are not residents of the Territory, five dollars (\$5) per annum. The term "fisherman" shall mean to include all persons employed on a boat engaged in fishing.

Chapter 94, Session Laws of Alaska, 1923.

Section 1. It shall be unlawful for any person to engage in fishing in the Territory of Alaska without first having obtained a license so to do under the provisions of this Act.

* * * * *

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
 - (b) For non-resident fishermen who during the entire year use only hook and line including trollers, but not including those who use set line \$3.00;
 - (c) For non-resident fishermen who use gill nets or set line \$10.00;
 - (d) For non-resident fishermen who use seines or set nets \$25.00;
- * * * * *

Chapter 57, Session Laws of Alaska, 1925.

Section 1. Section 2 of Chapter 94 of the Laws of 1923 is hereby amended so as to read as follows:

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
 - (b) For nonresident fishermen who use any fishing appharce except seines, \$10.00;
 - (c) For nonresident fishermen who use seines, \$25.00.
- * * * * *

Chapter 96, Session Laws of Alaska, 1929.

Section 1. That Section 2 of Chapter 94 of the 1923 Session Laws of the Territory of Alaska is hereby amended so as to read as follows:

Section 2. * * * The license fee shall be as follows:

- (a) For resident fishermen of all classes \$1.00;
- (b) For non-resident fishermen who use hook and line in trolling, \$250.00;
- (c) For non-resident fishermen who use gill nets, \$10.00;
- (d) For non-resident fishermen who use seines, \$25.00.

* * * * *

Chapter 30, Sessions Laws of Alaska, 1933.

Section 1. It shall be unlawful for any person to engage in fishing in the Territory of Alaska who is not a citizen of the United States, or who has not declared his intention to become such, and all persons qualified to engage in fishing, shall first obtain a license so to do under the provisions of this Act.

* * * * *

Section 2. * * * The license fee shall be as follows:

- (a) For each resident fisherman of all classes \$1.00;
- (b) For each non-resident fisherman who uses hook and line in trolling \$25.00;

(c) For each non-resident fisherman who uses gill nets \$25.00;

(d) For each non-resident fisherman who uses seines \$25.00;

(e) For each non-resident fisherman employed in operation of fish traps \$25.00.

* * * * *

Section 11. This Act repeals Chapter 94 of the Session Laws of 1923; Chapter 57 of the Session Laws of 1925, and Chapter 96 of the Session Laws of 1929.

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No. 329

IN THE
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OF THE UNITED STATES

OCTOBER TERM, 1951

M. P. MULLANE, Commissioner of Taxation of the
Territory of Alaska,

Petitioner,

vs.

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF FOR THE RESPONDENTS

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INDEX

	PAGE
Opinion Below	1
Question Presented	1
Statutes Involved	1
Statement	2
Summary of Argument	4
Argument	5
I. The Interstate Commerce Clause of the Constitution of the United States Restricts Territories as Well as States	5
II. The Tax Imposed on Nonresident Fishermen is in Violation of the Interstate Commerce Clause of the Constitution	7
III. Chapter 66 is in Violation of the Privileges and Immunities Clause of Article IV, Sec. 2 of the Constitution	16
IV. Chapter 66 Violates the Fourteenth Amendment and the Civil Rights Act, R.S. Sec. 1977; Sec. 41, Title 8 USCA	25
V. Chapter 66 Conflicts with the White Act for the Regulation of the Fisheries of the United States in the Waters of Alaska	33
Conclusion	40
Appendix	i

Statutes

Chapter 66, Session Laws of Alaska, 1949	passim
Alaska Organic Act—	
Section 3 (37 Stat. 512, 48 USCA Section 23)	1, 4, 5, 11, 17, 26, 39
Section 3 (37 Stat. 512, 48 USCA Section 24)	1, 4, 13, 26, 33
Section 9 (37 Stat. 514, 48 USCA Section 77)	1, 12, 13
White Act—	
Section 1 (43 Stat. 464 as amended, 48 USCA	
Section 222)	5, 18, 33, 34, 39
Section 8 (43 Stat. 467, 48 USCA Section 223)	2, 33
Civil Rights Act—	
R. S. Section 1977; 8 USCA Section 41	4, 25, 27, 29, 38
R. S. Section 1978; 8 USCA Section 42	29
Alaska Workmen's Compensation Law, Section 43-3-1 et seq.,	
Alaska Compiled Laws Annotated, 1949	22
Session Laws of Alaska, 1949, Ch. 114, page 308	24

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Alaska v. Troy, 258 U. S. 101.....	14
Alaska Fish Co. v. Smith, 255 U. S. 44.....	27
Alaska Steamship Co. v. Mullaney, 180 F. 2d, 805.....	7
Anderson v. Scholes, 83 F. Supp. 681.....	25, 31, 33
Anderson v. Smith, 71 F. 2d 493.....	36, 37, 38
Balzac v. Puerto Rico, 258 U.S. 298.....	26
Buscaglia v. Ballester, 162 F. 2d 805.....	12
Caminetti v. U. S., 242 U.S. 470.....	8
Collins v. Hardyman, 341 U.S. 651.....	28
County of San Mateo v. So. Pac. R. R. Co., 13 Fed. 145.....	32
Duncan v. Kahanamoku, 327 U.S. 304.....	4, 17, 19, 26
Edwards v. California, 314 U.S. 160.....	8
Freeman v. Hewit, 329 U.S. 249.....	14
Freeman v. Smith, 44 F. 2d 783, 62 Fed. 2nd 291.....	34, 36, 37, 38
Haavik v. Alaska Packers Assn., 263 U.S. 510.....	4, 13, 14, 17, 18, 19, 25, 33, 36, 39
Holden v. Hardy, 169 U.S. 366.....	33
Hurd v. Hodge, 334 U.S. 24.....	27, 28, 33
Inter-Island Co. v. Hawaii, 305 U.S. 306.....	6, 10
Johnson v. Kennecott Copper Corp., 5 Alaska 571.....	31
Kentucky v. Powers, 139 Fed. 452.....	33
McCready v. Virginia, 94 U.S. 391.....	38
McLean v. Denver and R. G. R. R. Co., 203 U.S. 38.....	5
Murphy v. Ramsay, 114 U.S. 15.....	33
Panama Refining Co. v. Ryan, 293 U.S. 388.....	13, 15
Schechter Corp. v. U. S., 295 U.S. 495.....	13, 15
Serra v. Mortiga, 204 U.S. 470.....	26
South Puerto Rico Sugar Co. v. Buscaglia, 154 F. 2d 96.....	25, 31, 33
Strauder v. West Virginia, 100 U.S. 303.....	33
Takahashi v. Fish & Game Comm., 334 U.S. 410.....	27, 30, 33, 39
Territory of Alaska v. Sears, Roebuck & Co., 79 F. Supp. 668.....	7, 9
Toomer v. Witsell, 334 U.S. 385.....	19, 20, 22, 38, 39
U. S. v. California, 322 U.S. 19.....	39
W. C. Peacock & Co. v. Pratt, 121 Fed. 772.....	27, 31

No. 329
IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1951

M. P. MULLANEY, Commissioner of Taxation of the
Territory of Alaska,

Petitioner,

vs.

OSCAR ANDERSON and ALASKA FISHERMEN'S UNION
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is found in 191 F. 2d 123 (R. 162-195).

QUESTION PRESENTED

Whether the Territory of Alaska has power to impose a tax of \$50 on nonresident fishermen engaged in the fisheries of the United States in all the waters of Alaska, by means of a statute which imposes a tax of only \$5 on fishermen in the same waters, who reside in the Territory.

STATUTES INVOLVED

The statutes involved are Ch. 66, Session Laws of Alaska, 1949; Act of Aug. 24, 1912, 37 Stat. 512, 514; 48 USCA

Secs. 23, 24, 77, and Act of June 6, 1924, c. 272, sec. 1, 8; 43 Stat. 464, 467; 48 USCA Sec. 222, 228. The pertinent portions are set forth in the Appendix, pp. i to iv.

STATEMENT OF THE CASE

This action was brought to enjoin the Tax Commissioner of Alaska from enforcing the provisions of Ch. 66, Session Laws of Alaska, 1949, and collecting a tax of \$50 from non-resident fishermen against a tax of \$5 from resident fishermen, and to obtain a declaration of the Court that the statute is void.

Respondents are residents of the States of Oregon, Washington and California. They are brought to Alaska each year during the salmon fishing season, which varies from twenty days in Bristol Bay to two months elsewhere (R. 19-20). They come at the expense and under the direction of salmon packing companies, which pack and ship salmon. They arrive a few days before the opening of the fishing season and after it is closed in Bristol Bay, they remain about ten days loading the ships (R. 66, 81-82). Residents, from whom the \$5 license fee is exacted, work a much longer period each year, as many of them are employed in the spring before the opening of the season, and they remain after the ships and nonresidents are gone, being employed in taking up floating equipment, etc. (R. 82).

The nonresidents involved in the case are members of a

union, which bargains collectively with the packer employers (R. 54). They travel from their home states to Alaska under contract; they engage in fishing and in loading the fish for shipment, and then return to their homes when the season is over and the fish are loaded on the ships. While in the Territory they are maintained by their employers without any cost or burden on the Territory. They receive no benefits from the Territory or its government. The testimony of petitioner was to the effect that it required 90% more work to collect the tax from nonresidents than was required to collect from residents. The District Court held that the Act of the Alaska legislature was valid and Findings and Conclusions were entered (R. 18). A decree was entered dismissing plaintiff's complaint (R. 23). In its conclusions, the trial court held that Chapter 66 did not burden interstate commerce in violation of Article I, Sec. 8 of the Constitution, and that it did not violate any of the other laws or constitutional provisions invoked by respondents in support of their asserted rights (R. 22).

The United States Court of Appeals reversed on the ground that the statute in question was in violation of Article I, Sec. 8 of the Constitution of the United States (R. 162). The court declined to pass upon the question raised by respondents that Chapter 66 was in conflict with Article IV, Sec. 2 of the Constitution of the United States as extended to Alaska by Section 3 of the Organic Act (37 Stat.

512), because of the decision in the case of *Haavik v. Alaska Packers' Association*, (1924) 263 U. S. 510, but called attention to the later case of *Duncan v. Kahanamoku*, (1946) 327 U. S. 304, in which this Court "expressly held that Sec. 5 of the Hawaiian Organic Act which is identical with Sec. 3 of the Alaska Organic Act, operated to extend certain constitutional provisions to the Territory of Hawaii" (R. 186-187).

SUMMARY OF ARGUMENT

1. The interstate commerce clause of the Constitution of the United States found in Article I, Sec. 8, restricts territories in the same way that it restricts the states.

2. The tax imposed by Chapter 66, Session Laws of Alaska, 1949, violates the interstate commerce clause, as held by the United States Court of Appeals for the Ninth Circuit.

3. Since the Organic Act of Alaska, c. 387, Sec. 3, 37 Stat. 512, provides that the Constitution of the United States shall have the same "force and effect" within the Territory as elsewhere in the United States, the privileges and immunities clause of Article IV, Sec. 2 of the Constitution is applicable to the Territory and Chapter 66 was passed in violation of that clause and in violation of the Fourteenth Amendment to the Constitution.

4. Chapter 66 is in violation of the Civil Rights Act, Sec. 41, Title 8 USCA. This Act is made expressly applicable

to the territories and it invokes the same limitations as the equal protection clause of the Fourteenth Amendment, and the Fourteenth Amendment describes substantially the same limitations as the privileges and immunities clause of Article IV, Sec. 2 of the Constitution.

5. The provisions of Chapter 66, which levy a tax on non-resident fishermen ten times greater than the tax on resident fishermen, is a violation of the White Act passed by Congress for the regulation of fisheries of Alaska (Act of June 6, 1924, c. 272; Sec. 1, 43 Stat. 454; 48 USCA Sec. 222).

ARGUMENT

I.

The Interstate Commerce Clause of the Constitution of the United States Restricts Territories As Well As States.

The Organic Act of Alaska (c. 387, Sec. 3, 37 Stat. 512; 48 USCA 23) provides that

"The Constitution of the United States and all laws thereof which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States * * *."

The Supreme Court decided in 1906 in *McLean v. Denver & Rio Grande Railroad Co.*, (1906) 203 U.S. 38, that the commerce clause (Article I, Sec. 8 of the Constitution), imposes the same restrictions upon territorial legislatures as it does upon the legislatures of the states. In that case an act of the legislature of the Territory of New Mexico,

providing for the inspection of hides and imposing a fee to cover the cost of inspection, was attacked on the ground that, as applied to interstate shipments of hides, the law violated the commerce clause. The Supreme Court held that

"The exclusive power to regulate interstate commerce is vested by the Constitution in Congress, and * * * other laws which undertake to regulate such commerce or impose burdens upon it are invalid."

But that

"It is equally well settled that a state or territory for the same reasons, in the exercise of the police power may make rules and regulations not conflicting with legislation of Congress upon the same subject, and not amending its regulations of interstate commerce."

The Supreme Court also recognized that the commerce clause operates in the case of territories the same as in the case of states, in *Inter-Island Company v. Hawaii*, (1938) 305 U.S. 306. An Hawaiian statute regulating public utilities imposed a fee upon all public utilities doing business in the Territory. The Act was made effective upon its approval by Congress. Congress amended the Act and, as amended, ratified and approved it. It was the Congressional amendments that brought the Inter-Island Company within the statute. To the contention that the statute constituted an invalid burden on interstate and foreign commerce, the Supreme Court answered that Congress has the power to regulate interstate commerce and therefore, even if the petitioner was engaged in interstate and foreign commerce, Congress

has exercised its power in this case by expressly ratifying the Hawaiian statute and by expressly subjecting the petitioner to the statute. Similarly, if Congress had passed a nonresident fisherman's license tax it might not be attacked upon the ground that the statute violates the commerce clause, because Congress would then be exercising the very power which the commerce clause vests in Congress exclusively. But, as the Supreme Court in the *Inter-Island* case recognized, the exclusive grant of power to Congress necessarily prohibits any other jurisdiction, state or territory from exercising the power.

In *Territory of Alaska v. Sears, Roebuck & Co.*, (1947) 79 F. Supp. 668, the District Court of Alaska for the First Judicial Division held that the interstate commerce clause is applicable to the acts of the Alaskan legislature and that a license tax imposed upon a taxpayer doing only interstate business is invalid.

See also *Alaska Steamship v. Mullaney*, (9th Cir. 1950) 180 F. 2d 805.

II.

The Tax Imposed on Nonresident Fishermen Is in Violation of the Interstate Commerce Clause of the Constitution.

The Court below held that the tax in question created a burden on interstate commerce, stating

"Thus it is apparent that so far as Alaska fisheries

are concerned, they are in the center of a great interstate movement, which begins when the fishermen start north to fish and terminates with the delivery of the processed product to the dealers in the states. The catching of the fish is but an interlude in this large flow of commerce." (R. 167-8.)

The transportation of these nonresident fishermen from the states of Washington, Oregon and California to Alaska to engage in this industry each summer constitutes interstate commerce and they are surely, as the Court said, "in the center of a great interstate movement."

This Court has held many times that the movement of persons from one state to another constitutes interstate commerce. In the case of *Caminetti v. United States*, (1917) 242 U.S. 470, it was held to be a regulation of interstate commerce for Congress to pass what is known as the "White Slave Law." The Court upheld the conviction of Caminetti and Diggs for transporting women from California to Nevada for immoral purposes.

In the case of *Edwards v. California*, (1941) 314 U.S. 160, a California statute prescribing a penalty for transporting into the state an indigent person, knowing him to be such, was held to be in violation of Article I, Sec. 8 of the Constitution of the United States and therefore void.

The nonresident fishermen in this case entered into contracts in Seattle with their employers. They were transported from the states of Washington, Oregon and California to

Alaska by their employers for a specific purpose, namely, to harvest the annual crop from the fisheries of the United States. They engaged in that work each year during the brief fishing and canning seasons. They loaded the product on ships and then they were transported home again by their employers.

If Caminetti and Diggs were in interstate commerce when transporting two women from Sacramento to Reno for immoral purposes, surely the salmon packers were also engaged in interstate commerce in transporting the respondents to Alaska from the states for the highly moral and essential purpose of obtaining a part of the nation's food supply.

In the case of *Territory of Alaska v. Sears, Roebuck & Co.*, (1947) 79 F. Supp. 668, the District Court for Alaska held to be invalid the application of a taxing statute when applied to the business of Sears, Roebuck & Co. in its shipment of goods into the Territory of Alaska.

Petitioner argues that since various discriminatory license taxes on nonresident fishermen have been in effect in Alaska for some years, as shown in the appendix to his brief, and since Congress had the power to disapprove them and had not done so, therefore the acquiescence of Congress must be taken to establish the fact that the language in the Organic Act (Sec. 3), which extends the provisions of the Constitution to the Territory, is not what it seems.

However, as said by this Court in *Inter-Island Steam Navigation Co. v. Territory of Hawaii*, (1938) 305 U.S. 306,

"Congress may not only abrogate laws of the Territory's legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid, and a valid act void * * * " (Citing authorities.)

However, Congress has not validated any of these non-resident fishermen licenses which have been in force in Alaska, as shown in the appendix to petitioner's brief. In the *Inter-Island Steam Navigation Company* case, Congress did expressly validate an act of the legislature of Hawaii and we may assume that until it does so it may not be said that the mere lapse of time amounts to acquiescence by Congress or a ratification of the local law. That is much like saying that the legislature may pass and make valid any act, however unconstitutional, unless and until Congress disproves it.

Congress does not have the duty of sitting as a watch-dog to see whether Constitutional rights of any person or class of persons are violated. That is a matter for the courts; and the courts do not even act to declare acts of legislatures valid or invalid, but they act only to protect the rights of persons or classes of persons who properly plead or prove that their rights have been violated by the operation of some invalid or unconstitutional law.

Congress has the sole power to regulate interstate commerce; it does not have the duty of doing anything about a territorial act which enters this field. It is left to some individual who has been deprived of his rights to challenge the invalid law in the courts.

The commerce clause is to be distinguished from the privileges and immunities clause of Article IV, Sec. 2 and of the Fourteenth Amendment. The commerce clause gives Congress plenary power over interstate and foreign commerce and as a necessary consequence it has the secondary effect of a restriction upon the power of all other jurisdictions, territories as well as states, in the premises.

The first clause of the first sentence of Section 3 of the Organic Act of Alaska reads:

"The Constitution of the United States and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." (c. 387, Sec. 3, 37 Stat. 512; 48 USCA 23.)

Let us consider the meaning of the words "elsewhere in the United States." Now what is the "force and effect" of the Constitution in California and of Article I, Sec. 8? Is it not that Congress alone has the exclusive power to tax the privilege to engage in interstate commerce? The Court below very aptly said:

"We cannot conceive that in granting legislative power to the Territorial legislature it was intended that

the power should exceed that possessed by the legislature of a state in dealing with commerce. The words 'all rightful subjects of legislation' describing the extent to which the legislative power of the Territory should extend (48 USCA, Sec. 77), do not include the imposition upon commerce as that here involved, of burdens which a state might not create under like circumstances. 'All rightful subjects of legislation' must be held to refer to matters local to Alaska." (R. 172.)

Petitioner argues in his brief that since the Congress has full power to legislate for Alaska and since it has set up the form of Territorial government provided in the Organic Act, the legislature could exercise whatever power Congress could with reference to the control of interstate commerce.

Petitioner cites the case of *Buscaglia v. Ballester*, (1947) 162 F. 2d 805, certiorari denied (1947) 342 U.S. 816. In that case the Court of Appeals for the First-Circuit in discussing a Puerto Rican tax which clearly would not have violated the commerce clause had it been enacted by a state, suggested that the commerce clause is not applicable to territories because Congress has the power to limit territorial action to the extent it chooses under Article IV, Sec. 3 of the Constitution. By its very terms, however, the commerce clause gives to Congress the exclusive power to regulate foreign and interstate commerce and, as the cases cited above demonstrate, no other jurisdiction, state or territory can exercise the power. If Alaska can pass a statute regulating or burdening foreign or interstate commerce then it must be that Congress has delegated its powers over foreign and

interstate commerce to Alaska. Sections 3 and 9 of the Alaska Organic Act would indicate that to the contrary Congress has very carefully limited the powers of the Alaskan legislature to exclude any power to regulate or burden foreign or interstate commerce. Furthermore, any such attempted delegation of power to the Alaskan legislature would appear to be invalid as an unconstitutional delegation of power.

Panama Refining Co. v. Ryan, (1935) 293 U.S. 388,
and

Schechter Corp. v. United States, (1935) 295 U.S.
495.

There is a difference between the Alaska Organic Act and that of Puerto Rico. In Alaska it is provided that the Constitution of the United States shall apply with the same force and effect as elsewhere in the United States. There is no such provision with reference to Puerto Rico.

In *Haavik v. Alaska Packers' Association*, (1924) 263 U.S. 510, it was held without considering the effect of the Organic Act, that the privileges and immunities clause of Article IV, Sec. 2 does not apply to Alaska. Whatever the validity of this conclusion, it has no bearing upon the application of the commerce clause to Alaska. The only reference we find to the commerce clause in the *Haavik* case is a brief reference to the fact that the appellant in his brief contended that the tax there in question was a matter "in which interstate commerce alone is involved" and that the Court in conclud-

ing the opinion states, "None of the points relied upon by appellant is well taken." There is no discussion of the commerce clause and no indication in the opinion as to how it was involved or what consideration was given it.

As pointed out above, the privileges and immunities clause of Article IV, Sec. 2 and the Fourteenth Amendment are by their terms limitations upon the powers of the states; the commerce clause is an exclusive grant of power to Congress and by necessary implication a limitation upon the powers of all other jurisdictions, territorial as well as state. The dissenting judge in the Court below suggests that the citation in the *Haavik* case of *Alaska v. Troy*, (1922) 258 U.S. 101, shows that the Court in the *Haavik* case did consider the interstate commerce feature, because in the *Troy* case the statute in question related directly to commerce. In the *Troy* case, however, the statute involved was an act of Congress and the case, therefore, has no bearing whatsoever upon the question whether a territorial legislature is free from interstate commerce restrictions imposed upon the states.

The Court below (R. 171) cited from the opinion in *Freeman v. Hewitt*, (1946) 329 U.S. 249, 252, as follows:

"Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade

free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Morgan v. Virginia*, 328 U.S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history."¹⁰

The opinion of the Court below then states:

"It cannot be said that the Alaska legislature has any greater freedom in burdening commerce between the States and the Territories than it would have if Alaska were a State."

It is suggested by the petitioner that the Alaskan legislature is an arm of Congress with power of legislation equal to those possessed by Congress; but we submit that the legislature is not an arm of Congress, but rather a creature of Congress with only such powers as have been conferred upon it and subject to all the limitations and restrictions set forth in the Organic Act.

• The Constitution extends to Congress the sole power to regulate interstate commerce and this power cannot be delegated.

Panama Refining Co. v. Ryan, (1935) 293 U.S. 388;
Schechter Corp. v. United States, (1935) 295 U.S.
 495.

¹⁰ The rationale of this aspect of the Commerce Clause is stated in *Southern Pacific Co. v. Arizona*, *supra*, at p. 768.

III.

Chapter 66 Is in Violation of the Privileges and Immunities Clause of Article IV, Sec. 2 of the Constitution.

Aside from its effect on interstate commerce and in addition to being a violation of the commerce clause of the Constitution, Chapter 66 is void because it conflicts with Article II, Sec. 4 of the Constitution.

When the Organic Act of Alaska was passed by Congress the Constitution was extended to the Territory with all of its provisions, including Article IV, Sec. 2 which contains the covenant that

"The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

It would appear, therefore, that the citizens of Washington, Oregon and California who are employed in the fisheries of the United States in the waters of Alaska are entitled to the same treatment as citizens of Alaska employed in the same fisheries.

Counsel for petitioner urge that there are certain provisions of the Constitution that cannot possibly apply to a territory and therefore cannot have the same "force and effect" therein as they do in the states. We grant that there are certain Constitutional provisions mentioned in petitioner's brief which are not in operation in the Territory, but

surely Section 8 of Article I and Section 2 of Article IV apply there as do many other parts of the Constitution and its amendments. If it were not so, why would Congress in Section 3 of the Organic Act say that the Constitution should have the same "force and effect" in Alaska as elsewhere in the United States? It was not provided that only a part of the Constitution should apply, but the Act says "the Constitution of the United States." It could well have limited the application of the Constitution to Alaska as the Court said in *Duncan v. Kahanamoku*, (1946) 327 U.S. 304, 317, it could have done but did not do by the use of identical language in the Organic Act of Hawaii.

Petitioner urges that Chapter 66, the validity of which is challenged in this case, may be upheld on the authority of *Haavik v. Alaska Packers' Association*, (1924) 263 U.S. 510. However, in the *Haavik* case the gist of the opinion is to the effect that if Congress could have levied a \$5 tax there under consideration, then the legislature could do so and that the power of the Territory was derived from the provision in the Organic Act which endowed the legislature with authority to deal with "all rightful subjects of legislation" not inconsistent with the Constitution and the laws of the United States.

The discussion of the effect of Article IV, Sec. 2 of the Constitution is not very clear. It is simply stated:

"We are not here concerned with taxation by a state. The license tax cannot be said to conflict with Article IV, Sec. 2 of the Constitution. * * * It applies only to nonresident fishermen; citizens of every state are treated alike. Only residents of the Territory are preferred."

It would seem, therefore, that the decision holds that Article IV, Sec. 2 can be applied only to states and it is a protection of citizens within the states, but that the legislature of Alaska under the authority given it in the Organic Act may transcend the powers possessed by the states and pass legislation which will abridge the rights of citizens of the various states coming into the Territory from the United States. In other words, this opinion would seem to hold that the legislature of Alaska can pass a law which will violate the privileges and immunities clause of the Constitution. However, since the *Haavik* decision there have been some changes not only in the law but in the decisions of this Court, so that the *Haavik* decision is no longer applicable.

In the first place, six months after the *Haavik* decision Congress passed the White Act for the regulation of the fisheries of the United States in the waters of Alaska (Act of June 6, 1924, c. 272, Sec. 1, 43 Stat. 464; 48 USCA Sec. 222) which contains the following language:

"* * * Nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce."

Twenty-two years after the decision in the *Haavik* case this Court decided the case of *Duncan v. Kahanamoku*, *supra*, saying that the Constitution of the United States was extended to Hawaii by Section 5 of the Hawaiian Organic Act which is identical with Section 3 of the Alaska Organic Act. The Court said:

"It follows that civilians in Hawaii are entitled to the Constitutional guarantee of a fair trial to the same extent as those who live in any other part of the country. We are aware that conditions peculiar to Hawaii might imperatively demand extraordinarily speedy and effective measures in the event of actual or threatened invasion. But this also holds true for other parts of the United States. Extraordinary measures in Hawaii, however necessary, are not supportable on the mistaken premise that Hawaiian inhabitants are less entitled to Constitutional protection than others, for here Congress did not, in the Organic Act, exercise whatever power it might have had to limit the application of the Constitution. Cf. *Hawaii v. Mankichi*, 190 U.S. 197. The people of Hawaii are therefore entitled to Constitutional protection to the same extent as the people of the 48 States." (327 U.S. 318.)

and in the Alaska Organic Act, Congress did not limit the application of the Constitution but expressly extended its provisions to the Territory.

Twenty-four years after the *Haavik* decision this Court decided the case of *Toomer v. Witsell*, (1948) 334 U.S. 385, and in that case there is a very full discussion of Article IV, Sec. 2 of the Constitution.

Unless the legislature of Alaska, has powers transcending those of a State legislature under the Constitution, the same Constitution which Congress said, in passing the Organic Act in Section 3, should have "the same force and effect in the Territory as elsewhere in the United States." It is difficult to see where this case is not controlled by the decision in *Toomer v. Witsell, supra*. In that case this Court said, at p. 395, after quoting Article IV, Sec. 2 of the Constitution:

"The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent sovereign States. It was designed to insure to a citizen of State A, who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. Indeed without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a mere league of States; it would not have constituted the Union which now exists." (Citing *Paul v. Virginia*, 8 Wall. 168.)

The Court then discusses what a State may do, under this constitutional limitation on its powers, and says at pp. 398-399:

"The State is not without power, for example to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats,

or even to charge nonresidents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them."

Since the Territory does not regulate the fisheries, it has no power to regulate the size of boats, nor type of gear, nor seasons. The record negatives the inference that respondents enjoy any benefits from Territorial institutions or that their brief sojourn each year while engaged in catching, packing and loading fish, puts the Territory to the slightest expense. They make their contracts in the States; they submit to physical examinations there; they are flown to Alaska by their employers, those going to the Bristol Bay region and at the Federal air base; they are taken from the landing field to the several canneries and fishing areas by their employers and at their expense; the union polices its own members; hospital and medical expense is furnished by the employers; (R. 51-63). They do not bring any families with them (R. 59). This means they do not need any educational facilities for children. They are taken back to the States by the employer if discharged before the end of the season (R. 64). The employers furnish board and lodging (R. 59). They are transported back home at company expense after the ships are loaded (R. 66). Under the Alaska

law even if a man is injured, the employer is liable for his workmen's compensation (R. 64) and see Alaska Workmen's Compensation Act, Alaska Compiled Laws Annotated 1949, Sec. 43-3-1 et seq.

Furthermore, even the taxes imposed on respondents are mostly paid by the employers and deducted from their earnings (R. 72). The petitioner admitted that (R. 150-151). It is true that the petitioner testified that it was much more work (not more expense) to collect the fishermen's taxes from nonresidents than from residents and the witness Parke estimated that 90% of the work of collecting the tax would be with nonresidents (R. 120). The trial court, no doubt through inadvertence, in Finding No. 9 (R. 21) makes this "approximately 90% of the cost," although neither the witness Parke nor the petitioner Mullaney could give any figures as to the cost of collecting either resident or nonresident license taxes, and both were questioned on the point—Parke by cross-examination and Mullaney through written interrogatories (R. 31, 32, 148, 149). Even if the cost were 90% more, since the tax is 900% more, it could hardly be defended under *Toomer v. Witsell*, 334 U.S. 385. Petitioner could not show that any additional cost was incurred in collecting from nonresidents. Respondents did not have the burden in the trial court of proving something which could be obtained only from petitioner. The cost of collection of taxes, the differentials, if any, in the cost, the number of

residents subject to the tax as against the number of non-residents, the amounts collected from each class were all matters peculiarly within the knowledge of the Tax Commissioner. Every effort was made to present this evidence to the court through the Commissioner and his deputy, and the result was that they said repeatedly they did not know. Surely, respondents, under the law and the rules, went as far as required and the burden was on petitioner, after he and his deputy were given the opportunity, to produce at least some approximate figures, to show the difference, if any, in the cost of collecting from nonresidents.

The law does not contain any reason for the so-called classification. It does not contain any preamble which might include some statement as to the reason or asserted justification for the discriminatory tax. The argument that it is more costly to collect from nonresidents than from residents finds no support in the record. Petitioner suggests in his brief that the Territory should not be required to show the extra cost of collecting from nonresidents to a mathematical certainty, and he asks what would be the measuring stick. The answer is that respondents did not ask for proof to a mathematical certainty, but insist that, applying the measuring stick suggested in *Teomer v. Witsell, supra*, the burden was on petitioner to present some facts to show that there was at least some difference in cost of collection if that were a fact.

The record shows that Chapter 66 was passed and ap-

proved on March 21, 1949, several months before the 1949 fishing season was opened. It applied to the whole calendar year. The suit was tried March 16, 1950 (R. 46). Petitioner then had behind him a full calendar year's experience. He must have had a full year's record of tax collection costs. And that is not all, for the suit was filed May 26, 1949 (R. 6) and, therefore, petitioner had nearly ten months' notice that he would be called upon to produce some records to justify the tax.

It seems rather far-fetched to argue that the additional tax is imposed on nonresidents because of the added expense in collecting the tax from them. The respondents are members of one union having 3200 nonresident fishermen members (R. 20). The Court of Appeals points out that the differential in the tax on these 3200 nonresident fishermen would amount to \$144,000 per annum. The record does not show exactly how many additional nonresident fishermen there are who belong to other unions. The Court below stated that it may be inferred from the record that the differential collected from all nonresident fishermen would be not less than twice \$144,000. If so, this would amount to \$288,000 per annum or \$576,000 for the biennium. Now the entire appropriation for the office of the Tax Commissioner to collect all taxes in the Territory for the biennium beginning April 1, 1949, was \$500,000 (\$250,000 per year) (c. 114 Session Laws Alaska 1949, p. 308).

It would appear, therefore, that the differential in the tax levied on nonresident fishermen would produce \$38,000 a year more than the entire appropriation for all tax collection, including property and income tax, tobacco and liquor tax, school tax, and the multitudinous taxes levied on fisheries, and not only of collecting them but of paying the total cost of the entire administration of the Tax Commissioner's office.

IV.

Chapter 66 Violates the Fourteenth Amendment and the Civil Rights Act, R. S. Sec. 1977; Sec. 41, Title 8 USCA.

As we have pointed out hereinabove, the commerce clause gives Congress plenary power to legislate concerning interstate and foreign commerce and, as a necessary consequence it has the secondary effect of a restriction upon the power of all other jurisdictions, territories, as well as states, in the premises. The privileges and immunities clause of Article IV, Sec. 2 and the Fourteenth Amendment, on the other hand, are by their terms prohibitions upon the states. The application of these provisions to territories of course depends upon whether Congress has determined that they shall be extended to the territories. If we concede that there are certain decisions, including the *Haavik* case and the cases of *South Puerto Rico Sugar Co. v. Buscaglia* (1st Cir. 1946) 154 F. 2d 96, and *Anderson v. Scholes*, (1949)

83 F. Supp. 681, which hold that the privileges and immunities clause of Article IV, Sec. 2 and the provisions of the Fourteenth Amendment do not apply to territories and that these constitutional provisions by their terms impose restrictions upon the powers of the states, we respectfully submit, however, that in none of these cases is it considered that Congress might not extend the application of these provisions to the territories and we urge that it did so extend them in the cases of Hawaii and Alaska by means of Section 5 of the Organic Act of Hawaii and Section 3 of the Organic Act of Alaska. These two provisions of these two Organic Acts have been discussed hereinabove and the case of *Duncan v. Kahanamoku*, (1946) 327 U.S. 304, would seem to settle the matter.

In *Balzac v. Puerto Rico*, (1922) 258 U.S. 298, the Supreme Court recognizes that Congress could make applicable to territories' constitutional provisions which otherwise would not apply, and in *Serra v. Mortiga*, (1907) 204 U.S. 470, the Supreme Court specifically held that Congress by statute had extended to the Philippine Islands the guarantees of the due process and equal protection clauses of the Fourteenth Amendment. The language of Section 3 of the Alaskan Organic Act and the obvious propriety of limiting the powers of a territorial legislature in the same manner that the Fourteenth Amendment and the privileges and immunities clause of Article IV, Section 2 limits the states,

demonstrate that Congress intended that these provisions should be applicable to Alaska.

That the Fourteenth Amendment is applicable to Alaska was assumed in *Alaska Fish Co. v. Smith*, (1921), 255 U.S. 44, and *W.C. Peacock & Co. v. Pratt*, (9th Cir. 1903) 121 F. 772.

The Fourteenth Amendment and the Civil Rights Act are discussed by the Court in the case of *Takahashi v. Fish and Game Commission*, (1948) 334 U.S. 410, as follows:

" * * * Moreover, Congress, in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided:

" 'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.' 16 Stat. 140, 144, 8 U.S.C. Sec. 41, 8 U.S.C.A. Sec. 41.

"The protection of this section has been held to extend to aliens as well as to citizens. (Citing authorities.) Consequently the section and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color. See *Hurd v. Hodge*, 334 U.S. 24, 68 S. Ct. 847. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide, 'in any state' on an equality

of legal privileges with all citizens under non-discriminatory laws."

One of the grounds of the dissenting opinion of Judge Denman in this case (R. 194-195) was that the majority opinion of the Court of Appeals did not dispose of the question raised as to the applicability of the section of the Civil Rights Act above quoted; and Judge Denman calls attention to the case of *Collins v. Hardyman*, (1951) 341 U.S. 651, and he concludes that the Court in that case held that the purpose of the act was: [

"to put the lately-freed Negro on an equal footing with his former master."

We do not understand the opinion in *Collins v. Hardyman* as holding that to be the only purpose of the Civil Rights Act. The case of *Collins v. Hardyman* arose under Section 47 of the Civil Rights Act which deals with conspiracy and the Court held:

"The facts alleged fall short of a conspiracy to alter, impair or deny equality of rights under the law, though they do show a lawless invasion of rights for which there are remedies in the law of California" (341 U.S. 812).

Petitioner cites the case of *Hurd v. Hodge*, (1948) 334 U.S. 24. In that case the District Court for the District of Columbia had enjoined certain Negroes from purchasing property in the District of Columbia in an area where the ownership of real property was restricted to whites. The District Court had also enjoined certain white persons,

notably one Urciolo, from leasing, selling or conveying real property to a Negro. Not only were the rights of Negroes involved, but also those of the white person Urciolo. The Court of Appeals affirmed the judgment of the District Court. The Supreme Court reversed it. After quoting Section 1978 R.S.U.S., which reads:

"All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property,"

the Court said:

"All petitioners in these cases, as found by the District Court, are citizens of the United States. We have no doubt that for the purposes of this section the District of Columbia is included within the phrase 'every state and territory' * * * " (p. 30).

And again, at page 34:

"White sellers, one of whom is petitioner here, have been enjoined from selling the properties to any Negro or colored person. Under such circumstances to suggest that the Negro petitioners have been accorded the same rights as white citizens to purchase, hold and convey real property, is to reject the plain meaning of language. We hold that the action of the District Court directed against the Negro purchasers and the white sellers denies rights intended by Congress to be protected by the Civil Rights Act, and that consequently the action cannot stand."

It would appear, therefore, that the purpose of the Civil Rights Act, including both Sections 41 and 42 (R.S. Secs.

1977 and 1978), was a little more than to put the lately-freed Negro on an equal footing before the law with his former master, and the same protection was given to a "white seller" who sells property to a Negro purchaser as is guaranteed to a white seller who sells to a white purchaser. Urciolo, who was sued along with the Negro purchaser, was obliged to assert his rights under the Civil Rights Act and those rights, as well as those of the Negro purchaser, were adjudicated in the suit.

The Civil Rights Act is expressly applicable to territories and it would seem that the protection afforded by the Fourteenth Amendment upon which the Court says, in the *Takahashi* case, the Civil Rights Act rests, would without doubt apply in the territories.

If, as the Court said in the *Takahashi* case, the Fourteenth Amendment and the laws adopted under its authority embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws and this protects an alien, ineligible to citizenship, to fish in the waters off the state of California on an equality with all other residents and citizens of California, there would seem to be no question but that a citizen of the state of Washington or the state of Oregon should be entitled to abide in the Territory of Alaska on an equality of legal privileges with all other citizens and under non-discriminatory laws.

There are two cases frequently cited to support the proposition that the Fourteenth Amendment does not apply to territories. *South Puerto Rico Sugar Co. v. Buscaglia*, (1946, 1 Cir.) 154 F. 2d 96; *Anderson v. Scholes*, (1949) 83 F. Supp. 681. The case of *South Puerto Rico Sugar Co. v. Buscaglia* involved a statute imposing a higher income tax on foreign corporations than upon domestic corporations. The statute was held to be valid. The case of *Anderson v. Scholes* involved a territorial statute providing for service of process upon nonresidents. The statute was held invalid under the Fifth Amendment and the privileges and immunities clause of Article IV, Sec. 2, Federal Constitution. The first case cites no authority for its conclusion and the second one relies upon cases involving unorganized territories having no legal legislatures. On the other hand, the Federal Courts have recognized without discussion that the amendment is a limitation upon the legislative powers of an organized territory. *W. C. Peacock & Co. v. Pratt*, (1903) 121 F. 772, Cf. *Johnson v. Kennecott Copper Corp.*, (1916) 5 Alaska 571.

That organized territories, aspiring to statehood, and engaged in the structure of fiscal programs to facilitate the achievement of that objective should be subject to at least the same limitations in the exercise of the taxing power as states only makes common sense.

The decisions in cases arising under the Civil Rights Act

are unanimous in the view that it extends to all persons in every state and territory at least all of the protections guaranteed by the Fourteenth Amendment. In *County of San Mateo v. Southern Pacific Railway Co.*, (1882) 13 F. 145 Judge Field said:

"Equality of protection is thus made the constitutional right of every person; and this equality of protection implies not only that the same legal remedies shall be afforded to him for the prevention or redress of wrongs and the enforcement of rights, but also that he shall be subjected to no greater burdens or charges than such as are equally imposed upon all others under like circumstances. No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens. Property may indeed be classified, and different kinds be subjected to different rates. Real property may be taxed at one rate and personal property at another. Property in particular places may be taxed for local purposes, while property situated elsewhere is exempt. License taxes may also vary in amount according to the calling or business for which they are exacted. But arbitrary distinctions not arising from real differences in the character or situation of the property, or which do not operate alike upon all property of the same kind similarly situated, are forbidden by the amendment. Equality in the imposition of burdens is the constitutional rule, as applied to the property of individuals, where it is subject to taxation at all; and this imports that an uniform mode shall be followed in the estimate of its value, and that the contribution exacted shall be in some uniform proportion to such value prescribed, according to the nature or position of the property. All state action, constitutional or legislative, impinging upon the enforcement of this rule, must give way before it. Congress, in its legislation since the adop-

tion of the amendment, has recognized this to be the rule. The amendment was adopted in 1868, and in 1870 congress re-enacted the civil rights act, and to the clause that all persons within the jurisdiction of the United States should enjoy the same rights as white citizens, and be subject only to like punishment, pains, and penalties, it added, and be subject only to like taxes, licenses, and exactions of every kind, and to no other. Rev. St. Sec. 1977."

Accord: *Kentucky v. Powers*, (1905) 139 F. 452; *Murphy v. Ramsey* (1885), 144 U.S. 15 (involving inhabitants of territories and recognizing the equal application of the statute to territories); *Strauder v. West Virginia* (1879), 100 U.S. 303; *Holden v. Hardy* (1897), 169 U.S. 366, *Hurd v. Hodge* (1948), 334 U.S. 24.

Indeed, it may well be urged that the broad language of that statute effects a greater restriction upon the taxing power than does the amendment. Cf. *Takahashi v. Fish & Game Commission* (1948), 334 U.S. 410. Apparently this statute was completely overlooked in the *South Puerto Rico Sugar Co.* and *Anderson* cases and in the *Haavik* case.

V.

Chapter 66 Conflicts with the White Act for the Regulation of the Fisheries of the United States in the Waters of Alaska.

The fisheries of the United States are regulated and administered by the Act of Congress of June 6, 1924 (c. 272, Sec. 1, 43 Stat. 464; 48 USCA, Secs. 221, 222 et seq.)

Section 3 of the Alaskan Organic Act, *supra*, (48 USCA, Sec. 24) provides that the authority granted the legislature of Alaska by the Organic Act "to alter, amend, modify and

repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish and fur-seal laws * * *". This section further provides that neither shall this authority extend to taxes on business and trade, but the legislature is authorized to impose other and additional taxes or licenses.

The authority to impose additional taxes, however, does not mean discriminatory taxes.

The law in force in Alaska regulating the fisheries is known as the White Act passed on June 6, 1924. Section 222 contains the following provision:

"Nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce."

It will be observed that in the White Act Congress refers to the fisheries regulated as "the fisheries of the United States in all waters of Alaska."

It will be conceded that the language of the White Act prohibits a denial of the right to fish, and it may be argued that the tax in question on nonresident fishermen does not amount to a denial even although it discriminates against nonresident citizens by the imposition of a tax ten times higher than that levied on resident fishermen.

In the case of *Freeman v. Smith* (9th Cir. 1930) 44 F.2d 703; (9th Cir. 1932) 62 F.2d 291, there was involved a tax of \$250.00 on nonresident fishermen while the tax on residents was \$1.00.

The Court said in that case, after referring to the White Act for the regulation of the fisheries of the United States:

"It will thus be seen that the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska, where fishing is permitted by the Secretary of Commerce, is guaranteed to every citizen of the United States without reservation, whether he be a resident of Alaska or not, and the right so granted cannot be impaired or destroyed by the legislative assembly of the territory. If it can, the grant is an idle and empty one at best. Nor is the right thus conferred in anywise impaired by the last section of the act, which provides in general terms that nothing therein contained shall abrogate or curtail the powers granted the territorial Legislature to impose taxes or licenses nor limit or curtail any powers granted the territorial Legislature by the Organic Act.

* * *

"The naked power to impose taxes and licenses, or to make reasonable discrimination between residents and nonresidents, is not involved. On the contrary, the territory, under the guise of taxation, has attempted to destroy a right conferred by Congress on citizens of the United States, and asserts the broad right to do so because it has been endowed with the power to tax, and the power to tax is the power to destroy. The latter proposition may be true in fact as well as in theory, but it cannot be carried to the extent of destroying rights conferred by the constitution or laws of the United States. The claim of the territory is based, in a measure at least, on the erroneous assumption that the fish in Alaskan waters are the property of the inhabitants of the territory, under the unlimited control of the territorial Legislature. But no such right in the inhabitants of the territory, or in the territory itself, has ever been recognized by Congress. On the contrary, in the act to which we have referred, Congress has declared its pur-

pose to be to protect and conserve the fisheries of the United States in all waters of Alaska, and has delegated to the Secretary of Commerce full and complete authority to regulate the times and places when and where fish may be taken, the mode and extent of the taking, and almost every detail of the fishing industry, leaving little or nothing to the territory beyond the power to impose taxes and licenses. And this latter power cannot be so exercised as to defeat the general purpose of Congress, or destroy rights conferred by Congress upon citizens of the United States. We are of the opinion, therefore, that there is a plain and irreconcilable conflict between the act of Congress and the act of the territorial Legislature, and in such cases the latter must yield." (44 F.2d 704)

After the decision in the *Freeman* case the legislature passed another act in 1933 which continued the tax on residents at \$1.00 and fixed the tax on nonresidents at \$25.00.

In the case of *Anderson v. Smith* (9th Cir. 1934), 71 F.2d 493, the Court of Appeals upheld this tax, citing the case of *Haavik v. Alaska Packers Association*, 263 U.S. 510, *supra*, and the Court called attention to the provision in Section 3 of the Organic Act authorizing the legislature to levy additional taxes and licenses to those levied by Congress. The Court held that

"So long as the license tax imposed by the territorial Legislature upon the citizens of the United States who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with the exercise of the right granted by Congress, it is within the power of the territorial Legislature." (71 F.2d p. 495)

Neither of these cases was reviewed by the Supreme Court.

It will be seen, therefore, from an examination of these two decisions that the Appellate Court attempted to distinguish between a tax which it held to be unreasonable and one which it held to be reasonable and decided that so long as the tax appeared to be reasonable it was not a prohibitive discrimination within the language of the White Act. In the *Freeman* case a tax of \$250.00 was held to be too high, while in the *Anderson* case a tax of \$25.00 was upheld. This, then, confronts us with the task of drawing the line of demarkation between a tax which is unreasonable or too high and one which is deemed to be reasonable and not a discrimination or denial within the meaning of the White Act. If a tax of \$250.00 is too high and amounts to a denial to nonresidents of the right to fish, is a tax of \$240.00 too high or one of \$200.00? If a tax of \$25.00 is not a denial of the right to fish, would a tax of \$45.00 or \$50.00 or \$100.00 amount to a denial? Where shall the line be drawn? It would seem, then, that if the determination of the question of the denial of a right to fish, a right given to all citizens under the White Act, depends on the amount of tax, then every time the legislature imposes a discriminatory tax on nonresidents it would require a lawsuit to determine on which side of the line this tax would fall and whether it was reasonable and permitted or excessive and prohibited. The legislature, relying on the decision in the *Anderson* case, continued a tax of \$25.00 on nonresidents. Then in 1949, feeling that they had not yet reached the limit or the line between what is reason-

able and what is unreasonable, they doubled that tax and made it \$50.00. Perhaps at the next session they might feel that \$100.00 was still within the domain of what is reasonable. So that, unless some formula is found to settle the question of the extent to which the legislature may go, if indeed it can levy any higher taxes on nonresidents than on residents, the law will remain in confusion and neither the legislature nor the nonresident fisherman will know just where they stand with reference to these discriminatory taxes.

It would seem that this formula may be found in the case of *Toomer v. Witsell*, 334 U.S. 385, *supra*, and we refer the Court again to the language found at page 398 which limits the right to discriminate in the matter of taxes, to a differential "which would merely compensate the state for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay".

As we have pointed out hereinabove and as shown by the record in this case, there is no basis for any such differential whatsoever in Alaska under this formula. We wish to point out that in neither the *Freeman* case nor the *Anderson* case was the Civil Rights Act called to the attention of the Court or referred to in the decision. Even aside from the White Act it would seem that the earlier decisions of this Court, typical of which is *McCready v. Virginia* (1876), 94 U. S. 391, were based on the doctrine of state control of the fisheries in the tidal water of the state's rivers, bays and inlets.

The more recent decisions, however, such as the *Takahashi* and *Toomer* cases, *supra*, and the case of *United States v. State of California* (1947), 322 U. S. 19, have applied a different interpretation and have more narrowly restricted the state's jurisdiction over tidelands and fisheries within the tidal waters. The White Act and the Alaskan Organic Act are based on this modern doctrine. The Organic Act continues in Congress the sole right to regulate the fisheries of the United States in the waters of Alaska by expressly withholding from the local legislature the power of legislation on that subject and the right to regulate the fisheries. In other words, that power was lodged in Congress before the passage of the Organic Act and Congress retained it after the passage of the Act. The White Act regulating the fisheries of the United States in the waters of Alaska guaranteed the right to fish to all citizens of the United States, and this without regard to residence.

The decision of the Court in *Haavik v. Alaska Packers Association* (1924), 263 U. S. 510, falls in between the earlier cases and the more recent decisions in the *Toomer*, *Takahashi* and *California* cases; and the *Haavik* case was decided before the White Act was passed.

It seems clear that what Congress meant in the White Act by the language employed in 48 USCA, Sec. 222, by stating that no citizen of the United States should be denied the right to take, prepare, cure or preserve fish or shell-fish

in any area of the waters of Alaska where fishing is permitted, was that all citizens should be permitted to fish on an equality or on an equal basis as to taxes and regulations.

When we consider this section of the White Act along with the Civil Rights Act (8 USCA, Sec. 41) which provides that all persons within the jurisdiction of the United States in every state and territory shall be subject to the same taxes, licenses and exactions of every kind and to no other, we cannot escape the conclusion that the section of the White Act referred to was designed to put all citizens of the United States regardless of residence, on an equal footing in regard to their right to fish in the waters of Alaska.

CONCLUSION

For the reasons hereinabove stated it is respectfully submitted that the judgment of the Court below should be affirmed:

WHEELER GRAY,
ROY E. JACKSON,
CARL B. LUCKERATH,
Seattle, Washington,

Dated December 18, 1951.

WM. L. PAUL, JR.,
H. L. FAULKNER,
Juneau, Alaska.
Counsel for Respondents.

APPENDIX

CHAPTER 66, SESSION LAWS OF ALASKA, 1949

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, \$5.00; nonresident fisherman, \$50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months each calendar year thereafter, and who maintains his place of abode in Alaska. A nonresident is a citizen who has not resided in Alaska for the 12 months immediately preceding application for license or

who maintains his principal Business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

* * * * *

Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above, or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

Section 8. Sections 39-4-1 to 39-4-16, inclusive except 39-4-11, Alaska Compiled Laws Annotated 1949, are hereby repealed.

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and

iii

this Act shall take effect immediately upon its passage and approval. Approved March 21, 1949.

ACT AUG. 24, 1912, c.387 § 3, 37 STAT. 512
48 USCA § 23

Constitution and laws of the United States extended. The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. All the laws of the United States passed prior to August 24, 1912, establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; except as herein provided all laws in force in Alaska prior to that date shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature. (Aug. 24, 1912, c. 387, § 3, 37 Stat. 512.)

ACT AUG. 24, 1912, c. 387 § 3, 37 STAT. 512,
48 USCA § 24

The authority granted to the legislature by Section 23 of this title to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal revenue, postal, or other general laws of the United States or to the game, fish, and fur seal laws and laws relating to fur-bearing animals of the United States applicable to

Alaska, or to the laws of the United States providing for taxes on business and trade, or to Sections 41, 47, 161 to 169, 321 to 325, and 329 of this chapter. This provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses.

ACT AUG. 24, 1912, c. 387 § 9, 37 STAT. 514

48 USCA § 77

Same; general power and limitation. The legislative power of the Territory of Alaska shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, * * *

ACT JUNE 6, 1924, c. 272 § 1, 43 STAT. 464

48 USCA § 222

Unlawful fishing in areas; no exclusive rights to be granted; citizens. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided* that every such regulation made by the Secretary of Commerce shall be of general application within

the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. (June 6, 1924, c. 272, § 1, 43 Stat. 464.)

**ACT OF JUNE 6, 1924, c. 272 § 8, 43 STAT. 467,
48 USCA § 228**

Territorial powers not abrogated or curtailed. Nothing in sections 221 to 228 of this title contained, nor any powers conferred by said sections upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by Sections 23, 24, 44, 45, and 67 to 90 of this title.